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MUNICIPAL CORPORATION CASES

ANNOTATED.

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CASES AFFECTING MUNICIPAL CORPORATIONS
DECIDED BY THE COURTS OF
LAST RESORT

IN THE

UNITED STATES.

EDITED BY

THOMAS JOHNSON MICHIE.

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MUNICIPAL CORPORATION CASES.

VOLUME V.

WORKMAN

v.

MAYOR *et al.* OF NEW YORK.

(*Supreme Court of the United States, Dec. 24, 1900.*)

Maritime Law—Injury by Fire-Boat—Liability of City.*—It is the maritime, and not the local law, which governs in determining the liability of a city for injury caused by a fire-boat, owned by the city and in the custody and management of its fire department, which injury is caused by the negligent handling of such fire-boat while going to extinguish a fire burning in a building at the head of a dock.

Same—Same—Negligence.†—According to maritime law a city will be held liable for the negligence of its servants in charge of a fire-boat, when such fire-boat collides with another vessel, from which collision injury results to such vessel.

Exemption—Proceeding in Rem—In Personam.—If a fire-boat of a city is exempted from seizure *in rem*, such exemption will not relieve the city, under maritime law, from liability to an action *in personam*, where another vessel is injured by negligence of those in charge of such fire-boat.

On writ of certiorari to the United States circuit court of appeals for the Second circuit. Reversed.

Statement by Mr. Justice White:

Case Stated.

Workman, the libellant below, was the owner, on June 11, 1893, of the British barkentine Linda Park. On the date named, while the vessel was moored to a dock at pier 48 in the East river in New York City, she was struck and injured by the steam fire-boat New Yorker. At the time of the collision the New Yorker was running into the slip between piers 48 and 49 for the purpose of getting near to another fire-boat which had shortly prior thereto safely entered the slip. Both the fire-boats had been called in order to aid in extinguishing a fire in a warehouse situated a distance of 85 to 100 feet from the slip bulkhead. To recover the damage occasioned to his vessel, Workman filed, in the district court of the United States for the southern dis-

*See notes at end of case.

†As to liability of city for negligence of its servants, see City of Omaha *v.* Croft *et al.*, 3 Mun. Corp. Cas. 172, and *note*.

trict of New York, a libel in personam against the mayor, aldermen, and commonalty of the city of New York. This libel was subsequently amended by adding the allegations essential to make, as additional respondents, the fire department of the city of New York and James A. Gallagher, the person in charge of the navigation of the New Yorker at the time of the collision.

The district court entered a decree in favor of the libellant against the city of New York and Gallagher, and dismissed the libel as to the fire department. 63 Fed. Rep. 298.

The circuit court of appeals, to which the case was taken, affirmed the decree of the district court against Gallagher and in favor of the fire department. The appellate court, however, reversed that portion of the decree of the district court which held the city of New York liable, and remanded the case with instructions to dismiss the libel as against the city. 14 C. C. A. 530, 35 U. S. App. 201, 67 Fed. Rep. 347.

The case was then brought to this court by the allowance of a writ of certiorari.

Messrs. Harrington Putnam and Charles C. Burlingham, for petitioner.

Messrs. Theodore Connoly, Francis M. Scott, David J. Dean, James M. Ward, and John Whalen, for respondents.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

It is clearly deducible from the record that the courts below concurred in dismissing the libel as against the fire department of the city of New York, upon the contention made in the answer of the department that under the provisions of a named statute of the state of New York, the fire department of the city of New York was neither a corporation nor a quasi corporation, but was merely a department of the city. As no controversy is made respecting the correctness of the decree in this particular, we dismiss this subject from view.

With reference to the decree rendered by both courts against Gallagher, the district judge held that, giving due consideration to the emergency of fire, "the running into the Linda Park arose through lack of reasonable prudence, and was unnecessary and negligent." 63 Fed. Rep. 298. The circuit court of appeals, in its opinion, affirming the decree against Gallagher, said:

"The evidence in the record adequately supports the conclusion of the court below that the injuries caused to the libellant's vessel by the impact of the fire-boat were caused by the negligent manner (management?) of the fire-boat while the latter was trying to reach a convenient location to play upon a burning building near the pier at which the libellant's vessel was moored."

There is no substantial controversy raised on the record as

to the premise of fact upon which the personal decree against Gallagher was rendered by both the courts below. And even if such were not the case, the facts upon which Gallagher's liability depends are not now open to controversy, because of the well-settled doctrine that where both courts below have concurred in a finding of fact, it will, in this court, be accepted as conclusive, unless it affirmatively appears that the lower courts obviously erred. The Carib Prince, 170 U. S. 655, 658, sub nom.; Wuppermann v. The Carib Prince, 42 L. Ed. 1181, 1185, 18 Sup. Ct. Rep. 753, and cases there cited. It is clear that it was seriously claimed that both the courts below had manifestly erred in their appreciation of the facts as to negligence in the management of the fire-boat, the testimony would not justify the assertion. We shall therefore no further consider this feature of the case.

In order to elucidate the serious question which arises for discussion, we briefly state the reasons by which the courts below were led to reach opposing conclusions as to the liability or nonliability of the city.

The district court, on the assumption that the local law controlled, determined that by that law, as declared in decisions of the courts of the state of New York, the city was liable for the injury caused by the negligent management of its fire-boat. The circuit court of appeals, however, was of opinion that the city of New York was not answerable for the injury inflicted, for the reasons which it thus stated (14 C. C. A. 531, 35 U. S. App. 204, 67 Fed. Rep. 348):

"It is familiar law that the officers selected by a municipal corporation to perform a public service for the general welfare of the inhabitants or the community, in which the corporation has no private interest and from which it derives no special benefit or advantage in its corporate capacity, are not to be regarded as the servants or agents of the municipality, and for their negligence or want of skill it cannot be held liable. This is so, notwithstanding such officers derive their appointment from, and are paid by, the corporation itself. In selecting and employing them, the municipality merely performs a political or governmental function; the duties intrusted to them do not relate to the exercise of corporate powers, and hence they are the agents or servants of the public at large. Upon this principle it has uniformly been decided by the courts that municipal corporations are not liable for the negligence or wrongful acts of the officers of the police or health departments committed in the course of their ordinary employment. Unless the duties of the officers of the fire department are of a different complexion, and they are the servants of the municipality because they are engaged in performing one of its corporate functions, the same principle must extend immunity to the municipality for the negligent acts of these officers and their subordinates.

. . . . . .

"It is quite immaterial that the duties of these officers are defined and the offices created by the charter or organic law of the municipality. The test of corporate liability for the acts of the officers of the municipality depends upon the nature of the duties with which they are charged. If these, being for the general good of the public as individual citizens, are governmental, they act for the state. If they are those which primarily and legitimately devolve upon the municipality itself, they are its agents."

Having thus determined the general principle by which the liability of the city was to be judged, the court reviewed some of the decisions of the court of appeals of New York, and deduced from them that the city, in the operation of the fire-boat, performed a governmental, and not a corporate, function, and, therefore, under the assumption that the decisions in question were authoritatively controlling, held the city not liable.

Whilst it is contended at bar that the district court correctly decided, considering the local law of New York alone, that the city was liable, it is also asserted that even if by such law there was no responsibility on the part of the city of New York, nevertheless the circuit court of appeals erred in deciding that the city was not bound, because by the maritime law the liability existed, and such law should have controlled, although the local law was to the contrary.

We come then to consider first, whether, in the decision of the controversy, the local law of the city of New York or the maritime law should control; and, second, if the case is solely governed by the maritime law, whether the city of New York is liable.

In examining the first question, that is, whether the local law of New York must prevail, though in conflict with the maritime law, it must be borne in mind that the issue is not—as was the case in Detroit v. Osborne (1890) 135 U. S 492, 34 L. Ed. 260, 10 Sup. Ct. Rep. 1012, —whether the local law governs as to a controversy arising in the courts of common law or of equity of the United States, but, Does the local law, if in conflict with the maritime law, control a court of admiralty of the United States in the administration of maritime rights and duties, although judicial power with respect to such subjects has been expressly conferred by the Constitution (art. 3, § 2) upon the courts of the United States?

Maritime Law—Injury by Fire-Boat—Liability of City.

The proposition, then, which we must first consider may be thus stated: Although by the maritime law the duty rests upon courts of admiralty to afford redress for every injury to person or property where the subject-matter is within the cognizance of such courts, and when the wrongdoer is amenable to process, nevertheless the admiralty courts must deny all relief whenever redress for a wrong would not be afforded by the local law of a particular state or the course of decisions therein.

And this, not because, by the rule prevailing in the state, the wrongdoer is not generally responsible and usually subject to process of courts of justice, but because in the commission of a particular act causing direct injury to a person or property it is considered, by the local decisions, that the wrongdoer is endowed with all the attributes of sovereignty, and therefore as to injuries by it done to others in the assumed sovereign character, courts are unable to administer justice by affording redress for the wrong inflicted.

The practical destruction of a uniform maritime law, which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one state and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing to-day and another thing to-morrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent. And the principle by which the maritime law would be thus in part practically destroyed would besides apply to other subjects specially confided by the Constitution to the Federal government. Thus, if the local law may control the maritime law, it must also govern in the decision of cases arising under the patent, copyright, and commerce clauses of the Constitution. It would result that a municipal corporation, in the exercise of administrative powers which the state law determines to be governmental, could with impunity violate the patent and copyright laws of the United States or the regulations enacted by Congress under the commerce clause of the Constitution, such as those concerning the enrollment and licensing of vessels. This follows if a corporation must, for a wrong by it done, be allowed to escape all reparation upon the theory that, though ordinarily liable to sue and be sued, it possessed in the particular matter the freedom from suit which attaches to a sovereign state.

The disappearance of all symmetry in the maritime law and the law on the other subjects referred to, which would thus arise, would, however, not be the only evil springing from the application of the principle relied on, since the maritime law which would survive would have imbedded in it a denial of justice. This must be the inevitable consequence of admitting the proposition which assumes that the maritime law disregards the rights of individuals to be protected in their

persons and property from wrongful injury, by recognizing that those who are amenable to the jurisdiction of courts of admiralty are nevertheless endowed with a supposed governmental attribute by which they can inflict injury upon the person or property of another, and yet escape all responsibility therefor. It cannot be doubted that the greater part, if not the whole, of the maritime commerce of the country is either initiated or terminated in ports where municipal corporations exist. All the vessels, whether domestic or foreign, in which this vast commerce is carried, under the rule referred to, could be subjected to injury and wrong without power to obtain redress, since every municipality would be hedged about with the attributes of supreme sovereignty. For the principle which would exempt the municipal owner of a fireboat from legal responsibility would be equally applicable to boats used by a street department for the removal to refuse, to ferries, to pilot boats, to training-school ships—one of which, it is suggested in argument, the city of New York now actually operates, and to all other vessels which the municipality might consider it necessary or desirable to use. The wrong and injustice which would thus arise need not be commented upon.

The evil consequences growing from thus implanting in the maritime law the doctrine that wrong can be done with impunity were very aptly pointed out in Mersey Docks & Harbour Board v. Gibbs (1866) L. R. 1 H. L. 122. In that case it was sought to hold the dock trustees liable for damage occasioned to a ship and cargo in striking a mud bank while attempting to enter a dock. The trustees asserted an exemption on the ground that they did not collect tolls for their own profit, but merely as trustees for the benefit of the public. Lord Chancellor Cranworth said:

"It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising, not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed."

And still later, in deciding the case of Currie v. M'Knight (1897) A. C. 97, the House of Lords declared that while the admiralty law as known in England differs from the common law of England, and the common law of Scotland differs from the common law of England, because they were derived from divergent sources, yet the admiralty laws were derived both by Scotland and England from the same source, and "it would be strange as well as in the highest degree inconvenient if a different maritime law prevailed in two different parts of the same island."

Potential, however, as may be these arguments, predicated

on the inherent injustice of the doctrine contended for, and the serious inconvenience which must result from an attempt to apply it, we are not thereby relieved from considering the question in a more fundamental aspect. In doing so, it becomes manifest that the decisions of this court overthrow the assumption that the local law or decisions of a state can deprive of all rights to relief, in a case where redress is afforded by the maritime law, and is sought to be availed of in a cause of action maritime in its nature and depending in a court of admiralty of the United States.

In The Key City (1872) 14 Wall. 653, 660, sub nom.; Young v. The Key City, 20 L. Ed. 896, 898, it was held that Federal courts of admiralty were not governed by state statutes of limitation in the enforcement of maritime liens. In The Lottawanna (1874) 21 Wall. 558, 578, sub nom.; Rodd v. Heartt, 22 L. Ed. 654, 663, it was held that the maritime law as accepted and received in this country did not confer a lien upon a vessel in favor of those who had furnished necessary materials, repairs, and supplies for such vessel in her home port, but that the district courts of the United States, having jurisdiction of the contract as a maritime one, might enforce liens given for its security, even when created by the state law.

In the course of the opinion, speaking through Mr. Justice Bradley, the court said (pp. 572, 573, 574, L. Ed. p. 661):

"Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, peculiarities exist either as to some of the rules or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with or shades off into the local or municipal law of the particular country, and affects only its own merchants or people in their relations to each other."

. . . . . .

"That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.'

"The Constitution does not attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary. It assumes that the meaning of the phrase 'admiralty and maritime jurisdiction' is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of 'cases in law and equity,' or of 'suits at common law,' without defining those terms, assuming them to be known and understood.

"One thing, however, is unquestionable; the Constitution

must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

In Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (1889) 129 U. S. 397, 443, 32 L. Ed. 788, 793, 9 Sup. Ct. Rep. 480, a maritime contract executed in New York was held to be an American contract, and the local law of New York was declared not to govern in its construction. In Butler v. Boston & S. S. S. Co. (1889) 130 U. S. 527, 32 L. Ed. 1017, 9 Sup. Ct. Rep. 612,—a case growing out of a collision in navigable waters within the territorial boundaries of Massachusetts—it was held that a state statute could not operate to deprive the owner of the offending ship of the benefit of the limited liability act, and that state legislatures could not change or modify the general maritime law. In The Max Morris (1890) 137 U. S. 1, 14, sub nom.; The Max Morris v. Curry, 34 L. Ed. 586, 589, 11 Sup. Ct. Rep. 29, the question for decision was, whether, in a court of admiralty, in a case where recovery was sought for personal injuries to the libellant arising from his negligence, concurring with that of the vessel, "any damages can be awarded, or whether the libel must be dismissed, according to the rule in common-law cases." (p. 8, L. Ed. p. 587, Sup. Ct. Rep. p. 30.) It was held (p. 15, L. Ed. p. 589, Sup. Ct. Rep. p. 33) that "the mere fact of the negligence of the libellant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery." In The J. E. Rumbell (1893) 148 U. S. 1, 17, 37 L. Ed. 345, 349, 13 Sup. Ct. Rep. 498, it was held that any priority given by a state statute, or by decisions in common law or in equity, to a mortgage upon a vessel as against a claim for supplies and necessaries furnished to the vessel in her home port, was immaterial, "and that the admiralty courts of the United States, enforcing the lien because it is maritime in its nature, arising upon a maritime contract, must give it the rank to which it is entitled by the principles of the maritime and admiralty law."

True, it is well settled that in certain cases where a lien is given by a state statute, the admiralty courts will enforce rights so conferred when not in absolute conflict with the admiralty law. The Lottawanna (1874) 21 Wall. 558, sub nom.; Rodd v. Heartt, 22 L. Ed. 654. Moreover, it has been decided that although at the time of the adoption of the Constitution, in courts of admiralty as in courts of common law, a cause of action for a personal injury abated by the death of the injured party, nevertheless, when, by a state statute, a right of recovery in

such a case was conferred, the admiralty courts would recognize and administer the appropriate relief. The Albert Dumois (1900) 177 U. S. 257-259, 44 L. Ed. 761, 20 Sup. Ct. Rep. 595, and cases cited. But such cases afford no foundation for the proposition that state laws or decisions can deprive an individual of a right of recovery for a maritime wrong which, under the general principles of the admiralty law, he undoubtedly possessed, and can destroy the symmetry and efficiency of that law by engrafting therein a principle which violates the imperative command of such law that admiralty courts must administer redress for every maritime wrong in every case where they have jurisdictional power over the person by whom the wrong has been committed. The cases in question, on the contrary, but illustrate the alacrity with which admiralty courts adopt statutes granting the right to relief where otherwise it could not be administered by a maritime court, and they hence do not support the contention that there is a want of power in admiralty courts to give redress in every case within their jurisdiction where the duty to do so is imposed by the maritime law. This distinction is well illustrated by the ruling in The Max Morris (1890) 137 U. S. 1, 14, sub nom.; The Max Morris v. Curry, 34 L. Ed. 586, 589, 11 Sup. Ct. Rep. 29. There it was asserted that by the universal principles of the common law, as well as of the local laws of the states, no right to recover for a wrong committed could be enforced in favor of one who had himself contributed to the producing cause of the injury. Whilst the premise was conceded the soundness of the inference deduced from it was denied, and it was held that as by the general principles of the maritime law a measure of relief would be afforded to a person who had suffered a wrong, even although he had contributed thereto, it was the duty of the admiralty courts to grant relief in accordance with the principles of the maritime law.

It being then settled that the local decisions of one or more states cannot, as a matter of authority, abrogate the maritime law, we are brought to consider whether, under the maritime law, the city of New York was liable for the injury inflicted by the fire-boat. As a prerequisite to a solution of this question it is necessary to determine what relation the city of New York bore to the fire-boat and those in control of it.

Same—Same—Negligence.

The fire department of the city of New York, as constituted when the collision in question occurred, was established by chapter 410 of the New York Laws of 1882. In the statute it was declared (§ 27) that "for all purposes the local administration and government of the city and county of New York shall continue to be in, and be performed by, the corporation aforesaid," i. e. "the mayor, aldermen, and commonalty of the city of New York." By § 34 were established eleven enumerated "departments in said city," among them a fire department. By §§ 40, 106, and 108, provision was made for a board of fire commissioners, to act as the executive head of

the department, to be nominated by the mayor, by and with the consent of the board of aldermen, and to be removable for cause by the mayor, subject to the approval of the governor of the state. The ministerial direction of the affairs of the department, including the preservation of the real and personal property used by it, was confided to this board of commissioners, but the city was made liable for all expenses of maintenance and operation, and was the owner of all the property of the fire department. §§ 424 et seq. In addition to making the city liable for all expenses connected with the maintenance and operation of the department, it was provided in § 450 of the statute that any damage caused by the authorized destruction of buildings to stay the progress of fire should be borne by the city of New York.

In order to emphasize these material facts we repeat that it unquestionably appears that the fire department of the city of New York was an integral branch of the local administration and government of that city. The ministerial officers who directed the affairs of the department were selected and paid by the city; all the expenses of the department of every kind and nature were to be borne by the city, which was bound by all contracts made for such purpose; all the property of the department, including the fire-boats, belonged to the city; and the city was liable in case of an authorized destruction on land of property of individuals to prevent the spread of a conflagration.

That, upon such a state of things, the relation of master and servant existed between the city of New York and those in charge of the fire-boat is clear. And that under the general maritime law, where the relation of master and servant exists, an owner of an offending vessel committing a maritime tort is responsible, under the rule of respondeat superior, is elementary. Thorp v. Hammond (1871) 12 Wall. 408, 20 L. Ed. 419; The Plymouth (1866) 3 Wall. 35, sub nom.; Hough v. Western Transp. Co., 18 L. Ed. 128.

It is not gainsaid that, as a general rule, municipal corporations, like individuals, may be sued; in other words, that they are amenable to judicial process for the purpose of compelling performance of their obligations. True it is, that under the general law, growing out of the public nature of their duties, where judgments or decrees are entered against municipal corporations, such judgments or decrees may not, as a matter of public policy, be enforced by the levy on property held by the corporation for public uses. Meriwether v. Garrett (1880) 102 U. S. 472, 26 L. Ed. 197.

As a result of the general principle by which a municipal corporation has the capacity to sue and be sued, it follows that there is no limitation taking such corporations out of the reach of the process of a court of admiralty, as such courts, within the limit of their jurisdiction, may reach persons having a general capacity to stand in judgment. True, also, where admiralty process has been set

Exemption—Proceeding In Rem—In Personam.

in motion against a municipal corporation, public policy, it has been held, restrains a seizure of property used for public purposes by such corporation. The Fidelity (1879) 16 Blatchf. 569, Fed. Cas. No. 4,758. This conclusion, however, is but the application of the exception as to the mode of execution of a judgment or decree against such a corporation, to which we have referred, and its existence in the admiralty law in all cases has also been denied. The Oyster Police Steamers of Maryland (1887) 31 Fed. Rep. 763. Which of these conflicting conclusions, as to the exception in question, is correct we are not called upon on the present record to determine, since no levy of process upon the fire-boat was made or attempted to be made.

The contention is, although the corporation had general capacity to stand in judgment, and was therefore subject to the process of a court of admiralty, nevertheless the admiralty court would afford no redress against the city for the tort complained of, because under the local law the corporation as to some of its administrative acts was entitled to be considered as having a dual capacity, one private, the other public or governmental, and as to all maritime wrongs committed in the performance of the latter functions it should be treated by the maritime law as a sovereign. But the maritime law affords no justification for this contention, and no example is found in such law, where one who is subject to suit and amenable to process is allowed to escape liability for the commission of a maritime tort, upon the theory relied upon. We, of course, concede that where maritime torts have been committed by the vessels of a sovereign, and complaint has been made in a court of admiralty, that court has declined to exercise jurisdiction, but this was solely because of the immunity of sovereignty from suit in its own courts. So, also, where, in a court of admiralty of one sovereign, redress is sought for a tort committed by a vessel of war of another nation, it has been held that as by the rule of international comity, the sovereign of another country was not subject to be impleaded, no redress could be given. Both of these rules, however, proceed upon the hypothesis of the want of a person or property before the court over whom jurisdiction can be exerted. As a consequence, the doctrine above stated rests, not upon the supposed want of power in courts of admiralty to redress a wrong committed by one over whom such courts have adequate jurisdiction, but alone on their inability to give redress in a case where jurisdiction over the person or property cannot be exerted. In other words, the distinction between the two classes of cases is that which exists between the refusal of a court to grant relief because it has no jurisdiction to do so, and the failure of a court to afford redress in a case where the wrong is admitted and jurisdictional authority over the wrongdoer is undoubted.

The decisions of this court clearly expound the principles,

we have stated. The Exchange v. M'Faddon (1812) 7 Cranch 116, 3 L. Ed. 287, involved the right of a court of admiralty to enforce, by a proceeding in rem, an alleged maritime claim against a vessel of war of a foreign nation. The right to relief was denied exclusively because of a want of jurisdiction over the foreign sovereign or his property.

The Siren (1869) 7 Wall, 153, sub nom.; The Siren v. United States, 19 L. Ed. 130, involved the liability of a prize ship in the possession and control of the officers of the United States for an injury inflicted by a collision of the ship with another vessel, averred to have been occasioned by the negligent management of those in charge of the prize ship.

In considering the power of the court to adjudicate the controversy, the court said (p. 155, L. Ed. p. 131):

"For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding in rem, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and uavailable for any purpose.

"In England, when the damage is inflicted by a vessel belonging to the Crown, it was formerly held that the remedy must be sought against the officer in command of the offending ship. But the present practice is to file a libel in rem, upon which the court directs the registrar to write to the lords of the admiralty requesting an appearance on behalf of the Crown —which is generally given—when the subsequent proceedings to decree are conducted as in other cases. Coote's New Admiralty Practice, 31. In the case of The Athol, 1 W. Rob. Adm. 382, the court refused to issue a monition to the lords of the admiralty to appear in a suit for damage by collision, occasioned to a vessel by a ship of the Crown; but the lords having subsequently directed an appearance to be entered, the court proceeded with the case, and awarded damages. As no warrant issues in these cases for the arrest of the vessels of the Crown, and no bail is given on the appearance, it is insisted that they are brought simply to ascertain the extent of the damages, and that the decrees are little more than awards, so far as the government is concerned. This may be the only result of the suits, but they are instituted and conducted on the hypothesis that claims against the offending vessels are created by the collision. The Clara, Swabey Adm. 3, and The Swallow, Swabey Adm. 30. The vessels are not arrested and taken into custody by the marshal, for the reasons of public policy already stated, and for the further reason that it is to be presumed that the government will at once satisfy a decree rendered by its own tribunals in a case in which it has voluntarily appeared."

As the prize vessel had been condemned and sold at the instance of the United States, and the proceeds were in the registry of the court for distribution, the court gave the relief sought against the proceeds of the sale, because the facts stated established, not only the liability of the offending ship, but also furnished the basis of jurisdiction.

The same principle was applied in the later case of The Davis (1869) 10 Wall. 15, sub nom. United States v. Douglas, 19 L. Ed. 875, where it was held that personal property of the United States on board of a vessel for transportation from one point to another was liable to a lien for salvage service rendered in saving the property from a peril of the sea, and that such lien might be enforced by a proceeding in rem, when the process of the court might be used without disturbing the possession of the government.

The statement of the maritime law of England on the subject now being considered, made in The Siren (1869) 7 Wall. 153, sub nom. The Siren v. United States, 19 L. Ed. 130, makes it clear that, in harmony with the maritime law of this country, the fact that a wrong has been committed by a public vessel of the Crown affords no ground for contending that no liability arises, because of the public nature of the vessel, although, it may be, in consequence of a want of jurisdiction over the sovereign, redress cannot be given. This is well illustrated by the cases to which we shall now refer.

The Athol (1842) 1 W. Rob. Adm. 374, was the case of a British troopship which had run down a brig in the English channel. The lords of the admiralty having refused a petition for compensation, the owner of the brig applied to the high court of admiralty to decree a monition to issue against those officials. In declining to issue the monition, for want of power, Dr. Lushington said (p. 382):

"Under the circumstances of this case then, both upon principle and the authority of decided cases, I must decline to issue the monition as prayed. At the same time, sitting here as a judge, in a court of justice, I am bound to express the opinion that I cannot apprehend the high personages who represent Her Majesty in her office of admiralty will avoid doing justice, or that upon a due consideration, they will take upon themselves to say that they will be themselves the exclusive judges upon the merits of the present case. Whether they shall appear or not, is not a matter for this court to determine. I decline to grant the monition."

The lords of the admiralty subsequently directed that an appearance should be made on behalf of The Athol, and as by this act the court had jurisdiction to determine the controversy, it did so, held The Athol to have been in fault, and, despite the public nature of the vessel, "the damages and costs were pronounced for."

The Parlement Belge (1879) L. R. 4 Prob. Div. 129, was an action instituted on behalf of the owners of a steam tug

against the steamship Parlement Belge and her freight to recover damages sustained by the tug in a collision with the steamship. The latter vessel was, at the time of the collision and when the action was instituted, a public vessel of the government of the sovereign state of Belgium, navigated and employed by and in the possession of such government, and officered by officers of the royal Belgium navy, holding commissions from His Majesty the King of Belgium, and in the pay and service of his government. Besides carrying the mails between Dover and Ostend, The Parlement Belge carried passengers and merchandise, and was employed in earning passage-money and freight. Sir Robert Phillimore declared (p. 144) that the case was one of first impression, and to be decided upon general principles and the analogies of law, rather than upon any direct precedent, and it was held that The Parlement Belge did not come within the category of a ship of war or a pleasure vessel belonging to the Crown of Belgium, and was not exempt from the process of the court. On appeal, however, (1880) (L. R. 5 Prob. Div. 197,) it was held that the admiralty court was concluded by the declaration of the sovereign authority that the vessel was a public vessel of the state, and, further, that the mere fact of the ship having been used subordinately for trading purposes did not take away the immunity attaching to the public vessel of an independent sovereignty, and that the vessel could not be proceeded against.

It results that, in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction. This being so, it follows that as the municipal corporation of the city of New York, unlike a sovereign, was subject to the jurisdiction of the court, the claimed exemption from liability asserted in the case at bar, because of the public nature of the service upon which the fire-boat was engaged—even if such claim for the purposes of the case be conceded—was without foundation in the maritime law, and therefore afforded no reason for denying redress in a court of admiralty for the wrong which the courts below both found to have been committed.

And these considerations would dispose of the case, were it not for two subordinate contentions which we deem it essential to notice before reaching a conclusion. The first, as expressed in the brief of counsel, is that the injury to the Linda Parke should have been held to have been the result of inevitable accident, because "whatever was done in regard to the navigation of the New Yorker was done in the excitement of the moment, and in view of the extent of, not only the possible, but probable, spread of the fire, under pressure of necessity." Pausing for a moment to analyze this contention, it results that it involves the self-destructive assumptions that

the maritime law, in order to render the person and property of the individual safe, in case of an emergency arising from the happening of fire, causes both the person and property of the individual to be unsafe, since without necessity and through negligence injury can be inflicted or destruction be brought about, without power, in the admiralty courts, to redress the wrong, although the wrongdoer be amenable to their jurisdiction. But, while it is true that the emergency of fire was an element to be considered in determining whether or not those in charge of the fire-boat were negligent on the occasion in question, since negligence is relative, that is, depends upon whether there was an absence of the care which it was the duty to exercise under the particular circumstances, yet, it does not follow that the emergency of fire exempted from the exercise of such due care as the occasion required towards property which was in the path of the fire-boat as it approached the slip for the purpose of getting into a position where it might assist in extinguishing the fire in question.

This principle has been heretofore applied by this court. Thus, in The Clarita (1875) 23 Wall. 1, sub nom. The Clara Clarita v. Cox, 23 L. Ed. 146, a tug boat, whose business it was to give relief to vessels on fire, in towing a vessel on fire from out of a dock, used a manilla hawser. While so engaged the hawser was burnt, and the burning vessel getting loose from the tug, drifted, and set fire to another vessel. It was urged upon the court "that it is the interest of shipping that an enterprising company, like the one which owned this tug—a company which at great expense fits up a tug with powerful steam pumps, and keeps the vessel ready with her fires banked, night and day, to move on a moment's notice everywhere about a harbor for useful service—should be encouraged;" and the emergency of the occasion it was claimed ought to exempt from liability. In holding that the tug was in fault this court said (p. 15, L. Ed. p. 151):

"Even ordinary experience and prudence would have suggested that the part of the hawser made fast to the burning ferryboat should be chain, and that it would be unsafe to use a hawser made of manilla. Where the danger is great the greater should be the precaution, as prudent men in great emergencies employ their best exertions to ward off the danger. Whether they had a chain hawser on board or not does not appear, but sufficient does appear to satisfy the court that one of sufficient length to have prevented the disaster might easily have been procured, even if they were not supplied with such an appliance."

And in accord with this doctrine is the local law of New York. Thus, in Farley v. New York (1897) 152 N. Y. 222, 46 N. E. 506, in speaking of the obligation to exercise due care devolving upon the driver of a fire engine, while responding to an alarm of fire, the court said (p. 227, N. E. p. 507):

"The conduct of the plaintiff was for the consideration of

the jury. . . . He was bound in driving to exercise the care which a prudent person would ordinarily exercise under similar circumstances. It was for the jury to say whether he was alert on this occasion, watchful to avoid obstructions which might be in his path, and whether there was any omission on his part of reasonable circumspection and diligence which contributed to the accident."

And indeed, although there are a number of cases holding that a municipal corporation is not liable for a positive injury to the person or property of an individual inflicted by its fire department, they do not rest upon the doctrine of emergency, which we are now considering. On the contrary, all these cases but expound the theory of sovereign attribute, which we have seen does not control the maritime law, and cannot justify an admiralty court in refusing to redress a wrong where it has jurisdiction to do so.

The remaining suggestion is that as a proceeding in rem could not have been maintained against the fire-boat because it was the property of the city of New York, and therefore an instrumentality employed in the performance of its municipal functions, no action in personam was available to the owner of the injured vessel. As we at the outset said, there is contrariety of opinion in the lower admiralty courts of the United States as to whether the rule of the courts of common law which exempts from seizure the property of a municipality devoted to its municipal uses obtains in a court of admiralty of the United States. This conflict, as we have also said, we deem it unnecessary to determine in this case, because, even if it be conceded that the fire-boat could not have been seized by process from a court of admiralty, the proposition that, therefore, the owner could not be called upon, in an action in personam, to respond for the damages inflicted by the boat, is without foundation. Of course, as has been repeatedly declared by this court, by the general admiralty law of this country, subject to the exemption from process possessed by the national government, a ship, by whomsoever owned or navigated, is liable for an actionable injury resulting from the negligence of the master and crew of such vessel. The John G. Stevens (1898) 170 U. S. 113, 120, 42 L. Ed. 969, 972, 973, 18 Sup. Ct. Rep. 544, and cases cited, 122, L. Ed. 973, Sup. Ct. Rep. 548. A liability of the owners in personam, however, is not dependent upon ability to maintain a proceeding in rem because of the maritime tort. A maritime lien may not exist in a cause of collision, for instance, when the thing occasioning the tort was not the subject of a maritime lien (The Rock Island Bridge (1867) 6 Wall. 213, sub nom.; Galena, D. D. & M. Packet Co. v. Rock Island R. Bridge, 18 L. Ed. 753), or such a lien, if it exist, may not be enforceable, and so may be said to render the offending thing not the subject of a maritime lien, because of the ownership and possession of such thing being in the government of the nation. The Siren

(1869) 7 Wall. 152, sub nom.; The Siren v. United States, 19 L. Ed. 129. Or the remedy in rem may not be available owing to the offending thing being actually in another country, or because of its loss intermediate the collision and the institution of legal proceedings.

A recovery can be had in personam, however, for a maritime tort when the relation existing between the owner and the master and crew of the vessel, at the time of the negligent collision, was that of master and servant. Thorp v. Hammond (1871) 12 Wall. 408, 20 L. Ed. 419; The Plymouth (1866) 3 Wall. 35, sub nom.; Hough v. Western Transp. Co. 18 L. Ed. 128.

The prerequisite in admiralty to the right to resort to a libel in personam is the existence of a cause of action, maritime in its nature. That a collision upon navigable waters of the United States, between vessels, by the fault of one of such vessels, creates a maritime tort and a cause of action within the jurisdiction of a court of admiralty, is, of course, unquestioned. And, as said by this court in Re Louisville Underwriters (1890) 134 U. S. 488, 490, 33 L. Ed. 991, 993, 10 Sup. Ct. Rep. 587:

"By the ancient and settled practice of courts of admiralty, a libel in personam may be maintained for any cause within their jurisdiction, wherever a monition can be served upon the libelee, or an attachment made of any personal property or credits of his."

Because we conclude that the rule of the local law in the state of New York—conceding it to be as held by the circuit court of appeals—does not control the maritime law, and, therefore, affords no ground for sustaining the nonliability of the city of New York in the case at bar, we must not be understood as conceding the correctness of the doctrine by which a municipal corporation, as to the discharge of its administrative duties, is treated as having two distinct capacities, the one private or corporate, and the other governmental or sovereign, in which latter it may inflict a direct and positive wrong upon the person or property of a citizen without power in the courts to afford redress for such wrong. That question, from the aspect of both the common and municipal law, was considered by this court in Weightman v. Washington (1861) 1 Black, 39, 17 L. Ed. 52; Barnes v. District of Columbia (1875) 91 U. S. 540, 23 L. Ed. 440; and in District of Columbia v. Woodbury (1890) 136 U. S. 450, 34 L. Ed. 472, 10 Sup. Ct. Rep. 990. And although this opinion is confined to the controlling effect of the admiralty law, we do not intend to intimate the belief that the common law which benignly above all considers the rights of the individual, yet gives its sanction to a principle which denies the duty of courts to protect the rights of the individual in a case where they have jurisdiction to do so. For these reasons we are sedulous to say that we must not be understood as in anywise doubting

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the correctness of the doctrines expounded by this court in the cases just cited, or as even impliedly approving contentions which may conflict with the principles announced in those cases.

Our conclusion is that the district court rightly decided that the mayor, aldermen, and commonalty of the city of New York were liable for the damages sustained by the owner of the Linda Park.

The decree of the Circuit Court of Appeals for the Second Circuit is reversed, and the decree of the District Court is affirmed.

NOTES.

Maritime Cases—Local Laws Have No Application.—In maritime cases, the federal court is governed by the general maritime law and local laws relating to admiralty causes have no application in such cases. Mutual Safety Ins. Co. *v.* The George, Fed. Cas. No. 9,981; The Seneca, Fed. Cas. No. 12,668; The Fidelity, Fed. Cas. No. 4,758; The Protector, 20 Fed. 207.

Illustrations—City Ordinance.—A city ordinance which attempts to take jurisdiction over a cause, which is cognizable under maritime law, unless such ordinance relates only to matters subject to police regulations, will be held to be void. The Palmetto, Fed. Cas. No. 10,699; City of Norwalk (D. C.), 55 Fed. Rep. 98; McCullough *v.* New York & N. Steamboat Co., Fed. Cas. No. 4.

Same—Collision at Pier.—Where a collision occurs between two vessels, at a pier in New York City, the local law has no application, and admiralty will take jurisdiction over the case. Camden and Cr. Transp. Co. *v.* The Lotty, Fed. Cas. No. 2,337a.

Same—Illegal Seizure under Local Law.—In case a vessel is illegally seized, under a local law, a district court of admiralty has jurisdiction to recover such vessel, as such seizure constitutes a maritime tort. Jervey *v.* The Carolina, 66 Fed. Rep. 1,013.

Same—Collision within Body of County.—Although, a collision occurs wholly within the body of a county, between a canal boat and a tug, engaged only in harbor service, admiralty will assume jurisdiction, in an action for damages, resulting from such collision, and the general maritime law will apply in such a case. The Volunteer, Fed. Cas. No. 16,990; The Tolchester, 42 Fed. Rep. 180. See also, Hamilton *v.* The John King, 49 Fed. Cas. 469; The Metropolis, Fed. Cas. No. 9,501; The Morning Star, Fed. Cas. No. 9,817; The Atlas, Fed. Cas. No. 633; The Narragansetts, Fed. Cas. No. 10,018; The Sweepstakes, Fed. Cas. No. 13,687; The Eleanora, Fed. Cas. No. 4,335; Stewart *v.* Potomac Ferry Co., 12 Fed. Rep. 296; Terrell *v.* Schooner, B. F. Woolsey, 4 Fed. Rep. 552.

Same—Proceeding in Rem against Boat of Municipality.—Although proceedings for injuries caused by vessels are *prima facie* cognizable in courts of admiralty, yet such vessels, when engaged in the service of municipal corporations, in a governmental capacity are not subject to

seizure by such courts, in a proceeding *in rem* against such vessels. The Fidelity, 16 Blatchf. (U. S.) 596, 6 Ben. (U. S.) 333.

Same—Liability of City in Action in Personam.—In an action against a city for damages caused to a vessel by reason of a collision between such vessel and an ice boat, which ice boat was maintained by the city to free the harbor from obstructions and aid commerce in its port, *held*, that the fact that the city could not be deprived of such boat by a proceeding *in rem* on account of public policy, yet there was no reason why a remedy against the city *in personam* should be denied. The F. C. Latrobe, 28 Fed. Rep. 377; Teto *v.* New York City, 61 Fed. Rep. 692.

KANSAS CITY P. & G. RY. CO.

v.

BOARD OF WATERWORKS IMP. DIST. NO. 1.

(*Supreme Court of Arkansas, Oct. 27, 1900.*)

Statutory Provisions—Evidence—Burden of Proof.—Where sec. 5341, Sand. & H. Dig., provides for enforcing assessments against real property for improvements, and sec. 5342, that it shall not be necessary to exhibit any copy or other paper, connected with such assessment or collection of moneys assessed under such act, with the complaint, and sec. 5157, makes authorized printed copies evidence of such ordinance. *Held*, that the burden of showing that such ordinance for assessment and improvement was legally passed as published is not on the plaintiff, where authorized printed copies are in evidence.

Same—Construction of Statute.—Under sec. 5321, *et seq.*, which provides for making improvements of municipal corporations, by organizing improvement districts, which shall include the whole city or a portion named in the petition for improvement signed by ten property owners residing in such district, the whole city may be included in one district, for construction of a city waterworks.

Railroad's Right of Way—Benefits Must Be Shown.*—Although the right of way of a railroad company is situated in such an improvement district as provided by sec. 5321 of Sand. & H. Dig., still the right of way cannot be assessed for improvement, unless benefit to such right of way is shown by such improvement.

Same—Enforcement of Lien.—Under such statute, the right of way of a railroad company cannot be sold for the purpose of enforcing taxes for improvements.

Appeal by defendant from Benton county circuit court in chancery. Reversed.

Read & McDonough and Dodge & Johnson, for appellant. E. P. Watson, W. V. Tomkins, and M. W. Greeson, for appellee.

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*See notes at end of case.

Kansas City, etc., Ry. Co. *v.* Board Waterworks Imp. Dist. No. 1

Case Stated.

Bunn, C. J. This is a bill to foreclose a lien on defendant's right of way extending through said improvement district, and the depot buildings and depot grounds situated therein, and to collect the amount of the district assessment made against said property. The answer puts in issue the passage of the ordinance organizing said district, and authorizing and making said assessment.

Statutory Provisions—Evidence—Burden of Proof.

The defendant first contends that the plaintiff has the burden of proof to show that said ordinances were duly passed, and were published as the law directs. Section 5341, Sand. & H. Dig., reads thus: "The board (on refusal of any property owner to pay his assessment) shall straightway cause a complaint in equity to be filed in the court having jurisdiction of suits for the enforcement of liens upon real property, for the condemnation and sale of such delinquent property, for payment of said assessment, penalty and costs of suits, in which complaint it shall not be necessary to state more than the fact of the assessment and the non-payment thereof within the time required by law, without any further statement or any steps required to be taken by the council, or board or any other officer whatever, concluding with a prayer that the delinquent property be charged with the amount of such assessment, penalty and costs, and be condemned and sold for the payment thereof." Section 5342: "It shall not be necessary to exhibit with the complaint any copy of any ordinance or other document or paper connected with the assessment and collection of the moneys assessed under this act." Then follow the provisions for the enforcement of the assessment, all showing the intention of the legislature to make the procedure the simplest and most expeditious consistent with the rights of the parties involved, and it is manifest that its intention was to make the few allegations of the complaint a prima facie case; that is, if not controverted in the pleading and by proof, to be sufficient to authorize the decree of condemnation and foreclosure. But the defendant contends that the proceeding is under section 5336 of the Digest, and not under the general statute, as expressed in section 5155 and 5157. Section 5336 has no reference to proof of publication, nor upon which party is the burden to show that the ordinance has been duly published. It only defines the duty of the clerk and of the one aggrieved by the assessment. Section 5157 provides for the recording and publication of all by-laws and ordinances of the council imposing any fine, forfeiture, or penalty, and makes no exception. It is a general ordinance on the subject. Section 5155 reads: "The printed copies of the by-laws and ordinances of any municipal corporation, published under its authority, and transcripts of any by-law, ordinance or of any act of any municipal corporation, recorded in any book or entered on any minutes or journal, kept under the direction of such municipal corporation, and certified by the clerk, shall be

received in evidence for any purpose for which the original ordinances, books, minutes or journal would be received (and) with as much effect." In construing these sections this court, in Van Buren v. Wells, 53 Ark. 377, 14 S. W. 40, after discussing other questions in the case, said: "The only remaining question is, was the burden on plaintiff to prove that the ordinances were published in the manner prescribed by the statute? We think not. The statute makes printed copies of the ordinances of any city or incorporated town, published by the authority of such city or town (and duly-certified copies are in evidence in this case), and manuscript copies of the same, copied by the proper officer, and having the seal of the city or town attached, evidence of the existence of the ordinances and their contents, and makes a failure to publish a sufficient defense to any suit or prosecution for the fines or penalties imposed by the ordinances." These sections furnish the rule in this case, and the question of burden of proof is settled in the case cited, and rests upon the defendant.

Same—Construction of Statute.

The next contention of defendant is that the city of Siloam Springs and its officers were without power or authority of law to assess its said property for the purpose of local improvements, or to pass the ordinance attempting to create said improvement district, and that they were without power or authority to make said improvements or levy said taxes against this defendant railroad company, chartered and organized for that purpose. This particular objection is not specifically made in the answer, and seems to involve two propositions: First, the power of the city to organize an improvement district including all its territory; and, secondly, whether or not the right of way of a railroad is the subject of an assessment for local improvements. The first of this proposition has been answered by the opinion of this court in Crane v. City of Siloam Springs, 67 Ark. 34, 55 S. W. 955. As to whether or not the right of way of a railroad extended through or into an improvement district was intended by the lawmakers to be subject to these assessments is a question not altogether free from doubt, owing to the peculiar right a railroad has in the property, and the peculiar use to which it is exclusively devoted. As to the manner of assessing rights of way, and incidentally as to the propriety of including rights of way in the list of property to be assessed, see Weltz, Assessm. § 142, and extensive notes thereunder. The statute (and so does the constitution) makes all real estate the subject of these assessments, and another statute makes all real estate subject to general tax to be also real estate subject to these assessments; and the general revenue laws of the state make rights of way, depot grounds, and so forth, real estate, and to be assessed as such. Prima facie, then, this class of property is subject to assessment; but, since all burdens of the kind are imposed only on the theory that the

Railroad's Right of Way—Benefits Must Be Shown.

improvements for which they are laid are of corresponding benefit to the property itself, if it can be shown that no benefit can accrue, then the property is not subject. But as the assessment itself, by proper authority, is prima facie valid, it necessarily devolves on one desiring relief from the burden to show that no benefits will accrue. This leads us to an understanding of the statement of Elliott, where he says in his work on Railroads: "It has been held that, if the property against which an assessment has been levied has not been benefited (or may not be) by the improvement, the collection of the assessment may be enjoined; but this doctrine is to be taken with careful qualification, for it is only in very clear cases that courts can interfere." Such, also, is the theory of all the decisions we have been able to find on the subject. Even those which deny that a right of way is in general subject to local assessment, all in one way and another, and to one extent and another, qualify the doctrine maintained by them by saying or indicating, at least, that when improvements do not benefit the property that fact is the real defense. Detroit, G. H. & M. Ry. Co. v. City of Grand Rapids (Mich.), 63 N. W. 1007, 28 L. R. A. 793, and citations in the dissenting opinion; In re Commissioners of Public Parks, 47 Hun 302; Chicago, M. & St. T. P. Ry. Co. v. City of Milwaukee, 89 Wis. 506, 62 N. W. 417, 28 L. R. A. 249. And these are the strongest cases we are able to cite just now. In the case at bar it would be assuming too much for us to say that the property assessed is not or will not be benefited, naturally, by the improvements made, in the absence of a stronger showing to that effect.

The procedure to assess and appraise the property seems to have been in substantial compliance with the statute. Under our revenue laws, railroad rights of way are valued as units, or by the entire lines, by the state board appointed for that purpose; and these appraisements are certified to the county assessors, through the auditor of state and county clerk, and he is required to make his assessment upon such valuation, and certify the same back on the record from which local assessments are made.

The decree, so far, is affirmed. But there is no authority to sell a section of the right of way of a railroad, although a lien is declared thereon for the assessment. Elliott says (section 791) that it is the general rule that, where the statute specially provides a remedy of the enforcement of the assessment, that remedy must be pursued, but if a right be given, and no remedy prescribed, the courts will usually provide the appropriate remedy. Whether we term this assessment a debt against the railroad in personam, or only in rem against the particular property, it can only be collected against the railroad as a unit; that is, against the whole road within the state. In ordering otherwise, the chancellor was in error. The cause is therefore reversed and remanded, to proceed against the railroad company, as such, to enforce the assessment in equity.

Same—Enforcement of Lien.

Notes

Paving—Assessment on Railroad's Right of Way.—The track of a railroad which borders on a street is properly assessable for its due proportion of the cost of improvement of such street under an ordinance of the city. Penn. & I. R. Co. *v.* Hanna, 68 Ind. 562; *In re* Cedar Park, How. Pr. N. S. (N. Y.) 257; Indianapolis P. & C. R. Co. *v.* Ross, 47 Ind. 25; Burlington & Mo. Ry. Co. *v.* Spearman, 12 Iowa 112; New Haven *v.* Fair Haven & W. Ry. Co., 38 Conn. 422; Columbus *v.* Street Ry. Co., 45 Ohio St. 98.

Same—Right to Assess Where Track Crosses Street.—Where a statute authorizes an assessment upon abutting property for street improvements such does not apply to a railroad's right of way and track which cross the street, as such right of way and track are not abutting property. Chicago, B. & Q. Ry. Co. *v.* South Park Com'rs, 11 Ill. App. 562; State *v.* Elizabeth, 37 N. J. L. 330; State *v.* Mayor of Newark, 27 N. J. L. 186; State *v.* Jersey City, 36 N. J. L. 56.

Same—Right of Way on Abutting Lot.—A company, which has a right to lay its tracks on a lot, but has no legal title to such lot, cannot be held liable for assessments levied on abutting owners for paving the adjoining street. Muscatine *v.* Chicago, R. I. & P. R. Co., 88 Iowa 291, 55 N. W. Rep. 100.

Same—Same—Legal Title to Lot in Company.—A lot owned and occupied by a railroad company with its track is not exempt from street assessment. Northern Ind. R. Co. *v.* Connelly, 10 Ohio St. 159; Providence & W. R. Co. *v.* Wright, 2 R. I. 459; Daniels *v.* Keeler, 10 Ohio St. 169; Ludlow *v.* Cincinnati Southern R. Co., 7 Am. & Eng. R. Cas. 231, 78 Ky. 357.

Same—Statutory Provision—Ratio of Benefits.—A railroad company, whose track runs along a street which is to be widened, will be assessed, in common with other property owners, according to the ratio of benefits received, and a statute providing for such assessments is constitutional. Appeal of North Beach *v.* M. R. Co., 32 Cal. 499.

Same—Track Laid in Tunnel.—Where a railroad track is laid along an avenue in tunnels, the report of the officer, whose duty it is to assess the expense of paving such avenue, shows that the company will in no way be benefited by such paving, will exempt such company from liability for assessments. People *ex rel. v.* Gilon, 41 Hun 510, 3 N. Y. S. R. 358.

Same—Track in Centre of Street.—Where land to be assessed must be that bordering on or touching the street, *held*, that the right of way of a railroad company in the centre of such street could not be subjected to such assessments as it neither borders on nor touches the street, but is a part of the street itself. O'Reilly *v.* Kingston, 114 N. Y. 439; State *v.* Newark, 3 Dutch. (N. J.) 186; South Park Com'rs *v.* Chicago, B. & Q. R. Co., 13 Am. & Eng. R. Cas. 415, 107 Ill. 105; Chicago & N. W. R. Co. *v.* People *ex rel.*, 120 Ill. 104.

Same—Contract with City—Subsequent Legislation.—A city ordinance authorized a railroad company to use its streets and provided that whenever the city should pave said streets the company should pave and keep in repair the space between its tracks. A subsequent legislative act gave the city the power to require paving outside the tracks, by the company. *Held*, such power was void as it impaired the obligation

of the contract entered into between the city and railroad company. Coast Line Ry. Co. *v.* Savannah, 30 Fed. Rep. 646. See also, as to liability for assessment, State *ex rel.* Wheeler *v.* District Court of Ramsey County, 4 Mun. Cas. 587, and *notes* at end of case; Pennsylvania R. Co. *v.* Dequesne, 46 Pa. St. 223; Fenelon Falls *v.* Victoria R. Co., 29 Grants Ch. (N. C.) 4; Mead *v.* Etobicoke Tp., 42 Am. & Eng. R. Cas. 81, 81 Ont. 438; London & N. W. R. Co. *v.* St. Paneras (Eng.), 17 L. T. 654; Reg. *v.* London, etc., Co. (Eng.), 46 L. J. M. C. 102; London, B. & S. C. R. Co. *v.* St. Giles, Camberwell (Eng.), L. R. 4 Ex. D. 239.

TAYLOR

v.

CITY OF CRAWFORDSVILLE.

(*Supreme Court of Indiana, Nov. 1, 1900.*)

Local Assessments—Due Process of Law—Constitutionality of Statute.*—The "Barrett Law" of Indiana does not require the costs of street and alley improvements to be assessed against abutting property by the front-foot rule, without regard to the question of resulting benefits, and it supplies to affected property owners "due process of law," and is not obnoxious to any provision of the state or federal constitution.

Local Improvement Proceedings—Right to Enjoin.†—A property owner cannot enjoin a threatened irregular and illegal step in municipal improvement proceedings, when there exists, under the law authorizing them, and by virtue of which he alleges it is proposed to undertake them, a complete remedy for such wrong.

Appeal by plaintiff from Montgomery county circuit court. Affirmed.

Ristine & Ristine and Harold Taylor, for appellant.

Johnston & Johnston, for appellee.

Hadley, J. This is an action by appellant to restrain the appellee from proceeding with the improvement of a part of Plum street, recently opened through her land. The com-

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plaint, being in a single paragraph, among other things, in substance avers that the plaintiff was the owner of real estate in the city of Crawfordsville 82½ feet in width, fronting on Wabash avenue, and 370 feet deep; that in 1899 the city extended and opened Plum street from Wabash avenue to Main street, and in so doing passed over and appro-

*See Barber Asphalt Pav. Co. *v.* French (Mo.), 4 Mun. Corp. Cas. 754, and *foot-note*.

†See Birdseye *v.* Village of Clyde (Ohio), 3 Mun. Corp. Cas. 13, and *note*, p. 19.

priated, for the purpose of said street, a strip 60 feet in width and 370 feet in length of the plaintiff's said land, leaving thereof a strip 21½ feet in width on the east side, and 11 feet in width on the west side, of Plum street, and abutting thereon; that in July, 1899, the common council, by more than a two-thirds vote of all its members, passed an ordinance to improve Plum street from Wabash avenue to Main street, and the declaratory resolution directing said improvement to be made is in these words: "Declaratory Resolution No. 40. Resolved, by the common council of the city of Crawfordsville, Indiana, that it is deemed necessary to improve Plum street from Wabash avenue to Main street by grading the roadway, and also by the construction of cement sidewalks five feet in width and cement curbing and gutters six inches thick and thirty inches wide. Said curbing and gutters and sidewalks to be constructed along both sides of said Plum street. All in accordance with profile and specifications on file in the office of the city civil engineer. The total cost of said improvement shall be assessed per lineal front foot upon the real estate abutting on said street improvements (except the portion thereon occupied by street and alley crossings, which shall be assessed against the city of Crawfordsville), said improvements, if waiver is filed, to be paid in ten annual installments. A bond or bonds may be issued in anticipation of the collection of said assessments, unless the property owners pay said assessments before said bond or bonds are issued, all as provided for in an act of the general assembly of Indiana approved March 8, 1889, and subsequent amendments thereof. The clerk is directed to advertise for bids." It is further averred that said common council are proceeding and will accomplish said improvement if not restrained, under and by virtue of an act of the general assembly of the state of Indiana approved March 8, 1889, commonly known as the "Barrett Law." The city engineer has advertised for bids for said work. There are no street or alley crossings within the limits of said 370 feet. The minimum cost of the improvement per lineal foot on each side of the street will be $1.50, the total cost to the plaintiff will be not less than $1,100, and the total value of the plaintiff's said property after the making of the improvements will not exceed the sum of $555. The city proposes to, and will if not restrained, make a contract for the making of said improvements, and will assess the total costs to the abutting property per lineal foot, without reference to the question of benefits, and will assess and incumber the plaintiff's property with an amount more than double the amount of benefits received, and more than the total value of the property when improved, which will be a confiscation of her property, and a taking thereof without just compensation, in violation of the federal and state constitutions. The court sustained a demurrer to the complaint, and, appellant refusing to amend, judgment was rendered against her.

The only question presented by this appeal is the constitutionality of the act of March 8, 1889, and the things threatened thereunder as being in derogation of her rights granted by the federal and state constitutions. In the recent case of Adams v. City of Shelbyville, 154 Ind. 467, 3 Mun. Corp. Cas. 575, 57 N. E. 114, we held that the act in question is not in violation of the federal or state constitutions, and no reason has since occurred to us to lead to a change or modification of the views therein expressed. The statements in the declaratory resolution and the averments of the complaint, that the city will assess the total cost of the improvement against the abutting property without reference to the question of benefits, and assess against the plaintiff's property an amount largely in excess of the benefits, cannot avail in support of injunction. It is a general rule that a defendant cannot enjoin the prosecution of illegal proceedings upon grounds which he may make available as a defense in such proceedings. Palmer v. Hayes, 93 Ind. 189; Martin v. Orr, 96 Ind. 27; Board v. Dickinson, 153 Ind. 682, 53 N. E. 929. And for the same reason he should not be permitted to enjoin a threatened irregular and illegal step in the procedure of municipal improvement when there eixsts, under the law regulating such procedure, a right to have such irregularity corrected and rendered harmless.

Local Assessments—Due Process of Law—Constitutionality of Statute.

Local Improvement Proceedings—Right to Enjoin.

Sections 3, 5, 6, and 7 of the Barrett law must be construed together, and, so construed, they give to the abutter an opportunity to be heard before a tribunal empowered, and in duty bound, to adjust all questioned assessments to the basis of actual special benefits received by the improvement. See Adams v. City of Shelbyville, supra. If appellant avails herself of this remedy, she may avoid injury, even though the primary allotment of the cost by the city engineer is placed at a sum greater than her benefits, and it is firmly settled in jurisprudence that, where a party has a clear and adequate remedy at law, he is denied the extraordinary remedy of injuncton. Ploughe v. Boyer, 38 Ind. 115; Caskey v. City of Greensburgh, 78 Ind. 233, 238; Smith v. Goodnight, 121 Ind. 312, 315, 23 N. E. 148; Martin v. Murphy, 129 Ind. 464, 467, 28 N. E. 1118. In McKee v. Town of Pendleton, 154 Ind. 652, 57 N. E. 532, it was held that a complaint averring like acts and like intentions by town officers was sufficient to sustain injunction; but it should be noted that in the McKee Case there was no averment that the officers had proceeded and would accomplish the improvement under the provisions of any law of this state, and that decision rests upon this ground. The demurrer to the complaint was properly sustained. Judgment affirmed.

Baker, C. J. I dissent. In the case of Adams v. City of Shelbyville, 154 Ind. 467, 57 N. E. 114, and City of Indianapolis v. Holt (Ind. Sup.), 57 N. E. 1100, I have fully ex-

pressed by views regarding the constitutionality of the street improvement laws of this state. I do not deem it needful to add anything to those views. But I desire to note the contrast between the present decision and that of McKee v. Town of Pendleton, 154 Ind. 652, 57 N. E. 532. In that case the town was threatening to construct a street improvement and collect the cost from the abutters by frontage. It was held that the complaint stated a good cause of action for injunction. In this case the complaint charges that the city is threatening to construct a street improvement and collect the cost from the abutters by frontage, and further shows that the city claims that such procedure is authorized by the Barrett law. The city's demurrer to the complaint admitted the facts to be true that were well pleaded, and this includes the averments of the intent. The plaintiff was bound by the statement of facts in her complaint, but not by her statement of her adversary's conclusions of law. The present decision holds an ordinance to be legal in which the city has determined upon an illegal method. Under the McKee Case, supra, I think the ordinance of the city of Crawfordsville should be held unlawful. How can this court decide, as a matter of law, that the city will hereafter abandon its unlawful intent, admitted as a question of fact? Is it the presumption that the city, like the king, can do no wrong?

LITTLE

v.

CITY OF HOLYOKE.

(*Supreme Judicial Court of Massachusetts, Oct. 19, 1900.*)

Personal Injuries—Negligence in Lighting Hall Let by City—Liability.* —Where a city lets the city hall for a public gathering, and one attending the meeting sustains personal injuries by reason of the city's failure to keep the stairs properly lighted, as required by its contract, damages may be recovered against the city for such injuries.

Evidence.—In such an action, the city was not prejudiced by the exclusion of evidence to show that the stairs were properly built, as the only negligence charged was that they were not properly lighted.

Same.—In such an action, evidence offered to show that the amount of rents obtained for the hall was sufficient to pay the expense of maintaining it was properly excluded, as it was of no consequence whether the business of lighting the hall was profitable to the city.

Authority of Officers—Questions Involved.—In such an action, as it was conceded by the defendant city that the hall was let by it, no question as to the authority of the city clerk, or any other city official, inconsistent with that admission, could be raised.

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*See notes at end of case.

Little *v.* City of Holyoke

Exceptions by defendant from Hampden county superior court. Exceptions overruled.

A. L. Green and F. F. Bennett, for plaintiff.

N. P. Avery, for defendant.

Hammond, J. This is in action of tort for injuries suffered by the plaintiff in descending a flight of stairs. At the trial the defendant presented 10 requests for instructions. In the argument before us it insists only upon the following, namely: (1) On all the evidence and the pleadings the plaintiff cannot recover, and the jury must find for the defendant. (2) There is no sufficient evidence that the plaintiff was in the exercise of due care, and the plaintiff cannot recover. (3) There is no sufficient evidence that the defendant was negligent, and the plaintiff cannot recover. It was agreed at the trial that the defendant let this hall to the Woman's Relief Corps for the day and night in question, for hire, and furnished the lights; that the gallery was a part of the hall; and that the city furnished light, and a janitor to take care of the hall. Without reciting the evidence in detail it is sufficient to say we have examined it, and think that, in addition to the facts agreed upon as above stated, it would warrant a finding that the defendant occasionally let the large hall in the second story of the city hall building for public gatherings, and received pay therefor; that on the evening in question the hall was let for the purpose of an entertainment to be given by the lessee; that it was understood as a part of the bargain that the defendant should light and keep properly lighted the entry and stairs leading to the hall and to the gallery of the same; that the stairs leading to the gallery were not kept properly lighted, but that one at least of the lights was negligently allowed to go out, so that the winding part of the stairs was in comparative darkness; that the descent of the stairs under these circumstances was attended with danger; that the plaintiff, who had been in the gallery at the entertainment, in attempting to descend the stairs, fell thereon, and was injured; that she was at the time in the exercise of due care, and that the accident was due to the negligent failure of the defendant to keep the stairs properly lighted. It is true that the evidence was conflicting on many of these points, and perhaps a finding the other way might have been reasonably expected; but, if the jury made the findings in accordance with the foregoing statement of what the evidence warranted, then the case is one where a municipal corporation has engaged in a private enterprise for profit, and has been negligent in the performance of a duty imposed upon it in the pursuit of that business; and the case is well within the principles laid down in Oliver v. City of Worchester, 102 Mass. 489; Collins v. Inhabitants of Greenfield, 172 Mass. 815, 1 N. E. 454, and

Case Stated.

Personal Injuries—Negligence in Lighting Hall Let by City—Liability.

Notes

Marwedel v. Cook, 154 Mass. 235, 28 N. E. 140, and the plaintiff may recover.

The exclusion of the evidence offered by the defendant to show that the stairs were well built, that winding stairs were a common and usual construction, that such stairs were suited to the peculiar construction of the building in that place, and that the stairs in question were safe and suitable, did not harm the defendant. The plaintiff did not claim that these stairs were improperly made for winding stairs, if winding stairs were to be in that place, but did claim that, if such stairs were placed there, they should be properly lighted. It was not a question whether winding stairs were improper, but whether, at the time of the accident, these stairs, in view of their construction, were properly lighted. As stated by the judge in his charge to the jury, the contention of the plaintiff was that "the stairway was of such a construction and such a nature * * * that it was dangerous unless there was sufficient light to enable her to see and understand and appreciate what the danger was."

Evidence.

The evidence offered to show that the amount of rents was sufficient to pay the expense of maintaining the hall was properly excluded. It was of no consequence whether the business was profitable. Collins v. Inhabitants of Greenfield, ubi supra. It being conceded by the defendant that the hall was let by the defendant, no question as to the authority of the city clerk, or any other city official, inconsistent with that admission, can be raised. Exceptions overruled.

Same.

Authority of Officers—Questions Involved.

NOTES.

Personal Injuries—Negligence—Liability of a City When Engaged in Private Business Enterprise.—Where powers conferred on a city are used for private benefit and gain and are not exercised by it in a public capacity, the law is well settled that it will be liable in damages for any injuries which result from the negligent exercise of such power. For example: as an owner of a gas works, water works, public docks, piers, etc., run by it as a source of emolument, in a private capacity, the city stands in the same relation to the public as a private person and is liable for any injury, in the same manner as an individual. Bailey *v.* Mayor, etc., of New York (N. Y.), 3 Hill 531, 38 Am. Dec. 669.

England.—Scott *v.* Mayor of Manchester, 37 Eng. L. & Eq. 495; Mersey Docks *v.* Gill, 11 H. L. Cas. 686; Mayor of Lynn *v.* Turner, Cowp. 86; Mersey Docks *v.* Panhallow, 1 H. L. Cas., N. S., 93.

United States.—Evanston *v.* Gunn, 99 U. S. 660; Barnes *v.* District of Columbia, 91 U. S. 541; Weightman *v.* Washington, 1 Black (U. S.) 39; Neb. City *v.* Campbell, 2 Black (U. S.) 590; Chicago *v.* Robbins, 71 U. S. 657; Mayor, etc., of New York *v.* Sheffield, 4 Wall. (U. S.) 189; Delger *v.* St. Paul, 14 Fed. Rep. 567; Providence *v.* Chapp, 58 U. S. 17; Manchester *v.* Ericsson, 105 U. S. 347.

Notes

Alabama.—Montgomery *v.* Gilmer, 33 Ala. 130; Smoot *v.* Wetumpka, 24 Ala. 486; Dargan *v.* Mayor of Mobile, 31 Ala. 469; Albrittin *v.* Huntsville, 60 Ala. 486.

Arkansas.—Little Rock *v.* Willis, 27 Ark. 512.

Colorado.—Denver *v.* Dunsmore, 7 Colo. 328; Denver *v.* Rhodes, 9 Colo. 554; Boulder *v.* Niles, 9 Colo. 415.

Connecticut.—Jones *v.* New Haven, 34 Conn. 1.

Florida.—Tallahassee *v.* Fortune, 3 Fla. 19.

Georgia.—Hamilton *v.* Columbus, 52 Ga. 435; Mayor of Savannah *v.* Walden, 49 Ga. 316; Mayor of Rome *v.* Dodd, 58 Ga. 239; Mayor of Milledgeville *v.* Cooley, 55 Ga. 17.

Illinois.—Browning *v.* Springfield, 17 Ill. 143; Bloomington *v.* Bay, 42 Ill. 503; Town of Waltham *v.* Kemper, 55 Ill. 346; Clayburgh *v.* Chicago, 52 Ill. 535; Springfield *v.* Le Claire, 49 Ill. 476; Lacon *v.* Page, 48 Ill. 499; Champaign *v.* Patterson, 50 Ill. 503; Sterling *v.* Thomas, 60 Ill. 265; White *v.* Bond Co., 58 Ill. 298.

Indiana.—Grove *v.* Ft. Wayne, 45 Ind. 429; Logansport *v.* Wright, 25 Ind. 513; Centerville *v.* Woods, 57 Ind. 192; Anderson *v.* East, 117 Ind. 126.

Iowa.—Soper *v.* Henry Co., 26 Ia. 264; Wallace *v.* Muscatine, 4 Green (Ia.) 373.

Kansas.—Smith *v.* Leavenworth, 15 Kan. 81; Wyandotte *v.* White, 13 Kan. 191; Jansen *v.* Atchison, 16 Kan. 358; Wingfield *v.* Peeden (Kan.), 57 Pac. Rep. 131.

Louisiana.—O'Neil *v.* New Orleans, 30 La. Ann. 220.

Maryland.—Anne Arundel Co. *v.* Duckett, 20 Md. 469; Baltimore *v.* Pendleton, 15 Md. 12; Phila. W. & B. R. Co. *v.* Davis, 10 Cent. Rep. 353, 68 Md. 281.

Massachusetts.—Murphy *v.* Lowell, 124 Mass. 564; Anthony *v.* Adams, 1 Met. (Mass.) 284; Hand *v.* Brookline, 126 Mass. 324; Lawrence *v.* Fairhaven, 5 Gray (Mass.) 110; Perry *v.* Worcester, 6 Gray (Mass.) 544; Parker *v.* Lowell, 11 Gray (Mass.) 353; Wheeler *v.* Worcester, 10 Allen (Mass.) 59.

Michigan.—Dewey *v.* Detroit, 15 Mich. 311; Detroit *v.* Corey, 9 Mich. 165.

Minnesota.—Turnell *v.* St. Paul, 20 Minn. 117; Bohen *v.* Wasua, 32 Minn. 176; Kobs *v.* Minneapolis, 22 Minn. 160; Simmes *v.* St. Paul, 23 Minn. 408.

Missouri.—Kiley *v.* Kansas City, 87 Mo. 103, 13 Am. & Eng. Corp. Cas. 446; Welsh *v.* St. Louis, 73 Mo. 71; Russell *v.* Columbia, 74 Mo. 490; Bassett *v.* St. Joseph, 53 Mo. 290; Halpin *v.* Kansas City, 76 Mo. 335; Blake *v.* St. Louis, 40 Mo. 570.

Mississippi.—Vicksburg *v.* Hemessy, 54 Miss. 392; Bell *v.* West Point, 51 Miss. 262.

Nebraska.—Omaha *v.* Olmstead, 5 Neb. 446.

Nevada.—McDonough *v.* Virginia City, 6 Nev. 90.

New Hampshire.—Wheeler *v.* Fray, 20 N. H. 80; Gilman *v.* Laconia, 55 N. H. 130; Eastman *v.* Meredith, 36 N H. 284.

New York.—Ehrgott *v.* New York, 96 N. Y. 264, 6 Am. & Eng. Corp. Cas. 31; Maxmillian *v.* New York, 62 N. Y. 160; Nelson *v.* Canisteo, 100 N. Y. 89; Barton *v.* Syracuse, 36 N. Y. 54; West *v.* Brock-

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port, 16 N. Y. 568; Requa *v.* Rochester, 45 N. Y. 129; Rochester White Lead Co. *v.* Rochester, 3 N. Y. 463; Saulsburg *v.* Ithaca, 94 N. Y. 27; Mayor of N. Y. *v.* Furze, 3 Hill 612; Lloyd *v.* Mayor of N. Y., 5 N. Y. 374; Cole *v.* Medina, 27 Barb. (N. Y.) 218; Clark *v.* Locksport, 49 Barb. (N. Y.) 580; Stores *v.* Utica, 17 N. Y. 114; Ring *v.* Cohoes, 77 N. Y. 83; Conrad *v.* Ithaca, 16 N. Y. 158; Wendell *v.* Mayor of Troy, 39 Barb. (N. Y.) 634; Peck *v.* Batavia, 32 Barb. (N. Y.) 634; Davenport *v.* Ruckland, 37 N. Y. 568; Kavanaugh *v.* Brooklyn, 88 Barb. (N. Y.) 232; Noonan *v.* Albany, 79 N. Y. 194; McCarthy *v.* Syracuse, 46 N. Y. 194.

North Carolina.—Mears *v.* Wilmington, 9 Ired. L. (N. Car.) 73.

Ohio.—Rhodes *v.* Cleveland, 10 Ohio 159; Dayton *v.* Pease, 4 Ohio St. 80; McCombs *v.* Akron, 15 Ohio 476; Western College of Medicine *v.* Cleveland, 12 Ohio St. 377.

Oregon.—Farquar *v.* Rosebury (Or.), 21 Pac. Rep. 103.

Pennsylvania.—Erie City *v.* Schwingle, 22 Pa. St. 285; Pittsburg *v.* Crier, 22 Pa. St. 54; Fritsch *v.* Allegheny, 91 Pa. St. 226.

Tennessee.—Niblett *v.* Nashville, 12 Heisk. (Tenn.) 684; Mayor of Memphis *v.* Lasser, 9 Hump. (Tenn.) 757.

Texas.—Galveston *v.* Posnainsky, 62 Tex. 118, 13 Am. & Eng. Corp. Cas. 484; Galveston *v.* Barbour, 63 Tex. 172.

Virginia.—Gordon *v.* Richmond, 83 Va. 436, 18 Am. & Eng. Corp. Cas. 251; Richmond *v.* Long, 17 Gratt. 375; Sawyer *v.* Corse, 17 Gratt. 230; Noble *v.* Richmond, 31 Gratt. 271.

West Virginia.—Wilson *v.* Wheeling, 19 W. Va. 324.

Wisconsin.—Gilluly *v.* Madison, 63 Wis. 518; Harper *v.* Milwaukee, 25 Wis. 365; Cook *v.* Milwaukee, 24 Wis. 270; Burns *v.* Elba, 32 Wis. 605; Ward *v.* Jefferson, 24 Wis. 342; Kenworthy *v.* Town of Ironton, 41 Wis. 647; Milwaukee *v.* Davis, 6 Wis. 377.

Same—Liability for Care of Buildings.—If a town owning a hall which is larger than necessary for municipal purposes and rents out such unoccupied part, it is bound, in the same manner as an individual would be, to take the proper care of such hall and will be liable in damages to any one injured by its negligence. Worden *v.* New Bedford, 131 Mass. 24; Oliver *v.* Worcester, 102 Mass. 499.

Same—Liability for Injury in Connection with Its Water Works.—Where a city owns an aqueduct for the purpose of supplying water for the inhabitants thereof and for its own use, a person, who is injured by a water-box, which projects beyond the surface of the street, is entitled to recover damages for such injury. Wilkins *v.* Village of Rutland (Vt.), 25 Am. & Eng. Corp. Cas. 49; Welsh *v.* Village of Rutland, 56 Vt. 228; City of Scranton *v.* Catterson, 94 Pa. St. 202; Aldrich *v.* Tripp, Treas., 11 R. I. 141; Kent *v.* Worthington Local Board, L. R., 10 Q. B. Div. 218; White *v.* Henley, 11 Q. B. Div. 118; Philadelphia *v.* Collins, 68 Pa. St. 106; Ferry *v.* New York, 8 Bosn. (N. Y.) 594; Treadwell *v.* New York, 1 Daly (N. Y.) 123; Brown *v.* Atlanta, 66 Ga. 71; Milnes *v.* Huddersfield, L. R., 10 Q. B. Div. 124; Merrimac River Canal Prop. *v.* Lowell, 7 Gray (Mass.) 223; Hildreth *v.* Lowell, 11 Gray (Mass.) 345; Esburg-Gunst Cigar Co. *v.* Oregon, 33 Or. 289.

Same—Liability for Injury by Wharf.—A municipality which owns and controls a wharf and charges toll for the use thereof, is liable to any one injured in the same manner as a private individual would be, as

this is a business carried on by it, in a private capacity. Willey *v.* Allegheny, 118 Pa. St. 490; Kennedy *v.* New York, 73 N. Y. 256; Clark *v.* Union Ferry Co., 35 N. Y. 256; McGuiness *v.* New York, 52 How. Pr. Rep. 450; Swords *v.* Edgar, 59 N. Y. 28; Mersey Dock Cases, 11 H. Lds. Cas. 687; Henley *v.* Lyme Regis, 2 Cl. & F. 331; Gibbs *v.* Liverpool Docks, 1 Hurlst & N. 439; Parnaby *v.* Lancaster Canal Co., 11 Ad. & El. 223.

Same—Liability for Injury on Account of Gas Works.—See Scott *v.* Manchester, 2 H. & N. 204; Cowley *v.* Sunderland, 6 H. & N. 565; Western Sav. Soc. *v.* Philadelphia, 31 Pa. St. 175; Kibele *v.* Philadelphia, 105 Pa. St. 41.

Same—Liability Depends upon Nature of Duty.—In Hill *v.* Boston, 122 Mass. 344, GRAY, J., in delivering the opinion of the court said: "Whether the neglected duty of a municipal corporation involves a liability, depends upon the nature of the duty; that is to say, whether it is imposed for pecuniary profit or special advantage of the city; if so the city is liable; or whether it is a duty imposed upon the city as a public instrumentality of the state without pecuniary or other special advantage to the city; if so the city is not liable."

Same—Same—Contra.—In California the courts hold that there is no liability resting on the municipality for injury caused by an act in a private capacity unless imposed expressly by statute. Chope *v.* Eureka, 78 Cal. 588, 25 Am. & Eng. Corp. Cas. 156; Arnold *v.* San Jose, 81 Cal. 619; Winbigler *v.* Los Angeles, 45 Cal. 36; Tranter *v.* Sacramento, 61 Cal. 275; Barnett *v.* Contra Costa Co., 67 Cal. 17; Crowell *v.* Sonoma Co., 25 Cal. 315; Huffman *v.* San Joaquin, 21 Cal. 430; Howard *v.* San Francisco, 51 Cal. 52.

JONES

v.

DUNCAN.

(*Supreme Court of North Carolina, Oct. 30, 1900.*)

Ordinances—Stock Running at Large—Penalties—Discrimination.*—The board of town commissioners of a town incorporated under N. Car. Priv. Laws 1889, c. 191, and amendments thereto, have authority to enact an ordinance declaring that hogs, etc., running at large in the town are nuisances, and imposing a fine on the owners who shall willfully permit any such animals at large within the town, and providing that owners of stock without the limits of the town, and within one mile thereof, shall pay a smaller penalty than those within, and that those more than one mile distant from the corporate limits will not be charged anything for the first three violations of the ordinance.

Appeal by plaintiff from Harnett county superior court. Affirmed.

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*See notes at end of case.

Notes

F. P. Jones, for appellant.

Simmons, Pou & Ward, for appellee.

Faircloth, C. J. This is claim and delivery by the plaintiff to recover his hogs, which were seized and impounded by the defendant, marshal of the town of Dunn, in Harnett county. The hogs had strayed into the streets of said town. The town was incorporated under Priv. Laws 1889, c. 191, and amendments thereto. The board of town commissioners declared by an ordinance that hogs, etc., running at large in the town, were nuisances, and imposed a fine on the owners who should willfully permit any such animals at large within the town, providing that owners of stock without the limits of the town, and within one mile thereof, should pay a smaller penalty than those within, and those more than one mile distant from the corporate limits would not be charged anything for the first three times. The only question presented, or so intended, is whether the said commissioners had authority to enact the ordinance, or whether it is void. This question has been heretofore considered and settled. In State v. Tweedy, 115 N. C. 704, 20 S. E. 183, it was held, upon previous decisions, that it was competent for the town to pass such an ordinance, and to prescribe a penalty for its violation, whether the owner of the stock should live inside or outside of the corporate limits. In Broadfoot v. Town of Fayetteville, 121 N. C. 418, 28 S. E. 515, 39 L. R. A. 245, it was held that the legislature could discriminate, on this subject, between resident and nonresident owners of stock, as such discrimination is not forbidden by the constitution of the state or of the United States. Affirmed.

NOTES.

Ordinances—Stock Running at Large—Discrimination as to Non-Residents.—Where an ordinance of a city, providing for the impounding of stock running at large, made discriminations in favor of non-residents, unless such ordinance was broken intentionally, was held valid and under its provisions non-residents were relieved from liability, yet it was held to apply to a person residing outside the city, when he had reason to believe his stock, if turned loose, would enter the town. Knoxville *v.* King, 75 Tenn. 441; Moore *v.* Crenshaw (Tex.), 1 White & W. Civ. Cas. Ct. App. 264.

Same—Same—Same.—Although under Acts 1895, c. 141, sec. 2, prohibiting a town from charging fines and poundage, where stray animals belonging to non-residents of a town are seized, are valid, yet the authorities are not prohibited from collecting the cost of feeding such stock. Aylett *v.* City of Elizabeth, 121 N. Car. 4.

Same—Enjoyment of Common Lands—Discrimination.—Where power is conferred upon a town to make such regulations as it may see fit for the improvement of common lands, such power does not authorize an

ordinance, discriminating against strangers in the enjoyment of the common, at the same time giving full benefit of it to residents of the town. Foster *v.* Rhoades, 1 Johns. (N. Y.) 191.

Same — Discriminations against Non-Residents Generally.—An ordinance of a city, which makes a discrimination against non-residents, by exempting persons, who reside in the city, from its provisions, is not a valid one. Brooks *v.* Maugan, 86 Mich. 576; Nashville *v.* Althorpe (Tenn.), 5 Coldn. 554; Charleston *v.* State, 2 Speer. L. 719; *Ex parte* Frank, 52 Cal. 606; Graffty *v.* Rushville, 107 Ind. 502.

Same—Same.—Where a by-law of a town gives privileges to its own citizens and to no others, it is void for discriminations. Hayden *v.* Noyes, 5 Conn. 391; State *v.* Orange, 56 N. J. L. 389; Pacific Junction *v.* Dyer, 64 Iowa 38.

MAYOR, ETC., OF CITY OF KNOXVILLE
v.
HARTH.

SAME
v.
GALBRAITH *et al.*

(*Supreme Court of Tennessee, Oct. 6, 1900.*)

Streets and Highways—Liability of City for Damages from Unauthorized Work.*—While the defendant city neither authorized nor ratified the act of grading a street, by which plaintiffs' property was injuriously affected, it suffered the work to be done, and received its benefits. *Held*, that the city could not escape liability for the damages resulting from the work on the ground that it was not the act of the city.

Appeals by defendant from Knox county circuit court. Affirmed.

Ruben L. Cates, for appellant.

Sansom, Welcker & Parker, for appellees.

Wilkes, J. These are actions against the city by the citizens and property owners for damages to their property which abuts on Cleveland street, in the city. It appears that one Lawson Irwin, a contractor, was employed by the trustees of Grey Cemetery to make some improvements on its property, which required the use of a large quantity of earth. He saw John J. Littleton, chairman, and John Hudiburg, associate member, of the board of public works, and from them obtained permission to get the earth from Cleveland street by grading it. The chairman directed the city engineer to establish a grade from the street, and he proceeded to do so, setting

*See notes at end of case.

stakes for the guidance of Irwin. The city did not employ or pay Irwin for the work, but simply permitted him to get the earth from the street under the guidance of its engineer. The street had not been previously graded, and there was no action of the board directing it to be done, or establishing the grade, and no ordinance passed. The only authority for the work on the street was the permission given by Littleton and Hudiburg as individuals, and not as a board. Plaintiffs' property abutted on this street, and their ingress and egress were seriously injured by the grading, and their property was thereby depreciated materially in value. The trial judge, hearing the case without a jury, gave judgment for plaintiff Harth for $225, and in favor of plaintiffs Galbraith & Maloney for $75, and the city has appealed.

The counsel for the city makes no complaint of the amount awarded, and does not question the fact that damage was done, but the contention is that the work was not done by the city, nor primarily for its benefit, and that the work was not authorized to be done by the city, but was done simply by permission of two of the three members of the board of public works, as individuals, and not in any board or official capacity, and under this state of facts the city would not be liable. The charter of the city provides that the board of public works shall have the exclusive power and control over the construction, supervision, cleaning, repairing, grading, and improving of all streets, alleys, etc., and to fix and establish the grade of all streets, alleys, avenues, and thoroughfares. If this street had been changed from the natural or a previously established grade by a valid act or ordinance of the city, it is conceded that under the act of 1891, c. 31, as amended by the act of 1893, c. 41 (Shannon's Code, § 1988), the city would have been liable for damages to the property of abutting owners; but it is insisted that the changing in this grade was not the act of the city, and it cannot be held liable therefor. On the other hand, it is insisted that the city is liable for such damages, resulting from a change of grade, whether such grading was legally authorized, or merely permitted to be done. The language of the act is broad enough to cover such grading, no matter by whom done, as the language does not refer to grading done by the city, but in general, and would embrace grading done by any other person. The courts give a liberal construction to such acts, in favor of the citizen, when the work is for the benefit of the general public. Mayor, etc., v. Nichol, 3 Baxt. 338. That this grading was a benefit to the city cannot be questioned, and, while the city neither authorized nor ratified the act in any official manner, it did permit the street to be torn up and graded, to the injury of the plaintiffs, and to its own benefit. A municipal corporation is the proprietor of its streets, which it holds in trust for the benefit of the corporation. The city must superintend, control, and regulate its streets, and it must so enforce measures

of vigilance and care over them as not to cause or allow damage to others by their condition. Mayor, etc., v. Brown, 9 Heisk. 2. It cannot devest itself of its duty to superintend and control all improvements and repairs made by its agents, servants, and contractors; citing Mayor, etc., v. Lasser, 9 Humph. 760. See City of Knoxville v. Bell, 12 Lea 159. Neither can it turn over to a third person the grading and control of one of its streets, and escape responsibility for his act, which it permits, and from which it receives benefit. If the city permitted this work to be done, and received and used it after it was done, it would be liable on that ground. If it was a tortious act, done by the sanction or permission of the corporation, it would be liable on that ground. 2 Dill. Mun. Corp. (4th Ed.), § 710. We are of opinion there is no error in the judgments of the court below, and they are affirmed, with costs.

NOTES.

Streets and Sidewalks—Liability of City for Damages from Unauthorized Work.—Where a city accepts work and ratifies the building of a new highway, by including it in a highway district, paying the contractor for the construction thereof, and by opening such highway to the use of the public for travel, it is not relieved from liability to a land owner, on account of want of power in the officer to authorize the building of it, or by reason of its improper construction. Carpenter *v.* Nashua, 58 N. H. 37.

Same—Same—Change of Grade.—Where in changing the grade of a street a city goes beyond its authority, by making the new gradation for ornamental purposes or to improve the general appearance of the street, it will be liable to the owner of adjacent property injured by the unauthorized act. City of Montgomery *v.* Townsend, 84 Ala. 478.

FLANDERS

v.

CITY OF FRANKLIN.

(*Supreme Court of New Hampshire, March 16, 1900.*)

Surface Water—Liability of City.*—A city is liable for damages, where, on account of a faulty drainage system, it invades property rights by turning surface water on another's land.

Same—Increase of Surface Water by City.—There is no obligation on a city to prevent the natural flow of surface water nor is it liable for damages resulting from land being flooded by such flow, but by increas-

*See Huffmire *v.* City of Brooklyn, 4 Mun. Corp. Cas. 181, and *note*. Also, Town of Thorntown *v.* Fugate *et al.*, 1 Mun. Corp. Cas. 62, and extensive *note* at end of case.

ing the quantity of such water and failing to provide an outlet for such increase, the city renders itself liable.

Same—Use of Natural Flow—Defense.—Where the owner of a lot, which was the natural drain for certain surface water, closed such drain and put another in its place, to which drains of the city were connected and by reason of a heavy rain lands of the plaintiff were flooded. *Held*, in an action against the city, that, since it had no right to use the natural drain across plaintiff's land for carrying off water collected by it, the fact, that if the natural outlet had not been closed, there would have been sufficient drainage, was no defense.

Same—Recommitment.—In such action where it does not appear whether the finding for the plaintiff was based on the failure of city to control such flow or its failure to provide means for draining the increase of flow, since a city is not obligated to control such natural flow, the case should be recommitted.

Appeal from Merrimack county probate court. Reversed.

Case for negligence in allowing a sewer, culvert, and brook in Prospect street to become filled up, out of repair, and insufficient to carry off the water, in consequence of which it flowed down Winnipiseogee street onto the plaintiff's land. Trial by a referee. The land slopes from Prospect street westerly down Winnipiseogee street to the plaintiff's land, on Railroad avenue. Prior to 1887 there was a depression in the Shepard lot, just west of Prospect street, through which the water collecting in Prospect street and vicinity flowed off. About 1887 the owners filled up the depression, and laid an 8-inch drain pipe in its place. In 1889 the defendants constructed a covered drain 18 inches square across Prospect street, and connected it with the Shepard pipe. This drain was designed to take the water from the Sturtevant lot, lying east of Prospect street, and also from the street. About the same time they built a similar drain across Prospect street, 200 feet further south, and connected it with the Shepard pipe. This was to drain the Schlegel land and take the water from the street. In 1897, during the largest rainfall since 1869, the Shepard pipe proved insufficient to carry off the water coming to it; and as a consequence the water flowed down Winnipiseogee street, and washed large quantities of sand upon the plaintiff's land. These results were not caused by the defendants' negligence, as alleged, but were caused by the faulty and insufficient system of drains; the Shepard pipe being of insufficient capacity to carry off the water coming to it from the other pipes. If the natural water course through the Shepard land had not been filled up, the plaintiff's land would not have been damaged. Upon the opening of the case the defendants called attention to the fact that the declaration only charged negligence in allowing the sewer to become filled up. The plaintiff replied that he would ask for leave to amend by charging a faulty system of construction, and repeated the

Case Stated.

statement in the closing argument. The defendants objected upon the ground that it was too late to cite in the owners of the Shepard land. Later the plaintiff filed a proposed amendment, to the allowance of which the defendants objected, and stated that if it was allowed they would probably demur. The referee found that the plaintiff could not recover upon his original declaration, but could under the amendment, if allowed, and assessed the damages.

George R. Stone and Edward B. S. Sanborn, for plaintiff.

Leach & Stevens, for defendants.

Surface Water—Liability of City.

Peaslee, J. If the defendants unreasonably turned surface water upon the plaintiff's land, thereby invading his property rights, they must answer for the consequences. Rhobidas v. City of Concord (N. H.; Dec., 1899), 47 Atl. 82. They were not obliged to prevent the natural flow of surface water, and, if they did nothing to increase it, they are not liable. If they increased the quantity of water, and unreasonably failed to provide an outlet, they are liable. Rindge v. Sargent, 64 N. H. 294, 9 Atl. 723. The fact that there would have been an outlet but for the acts of Shepard is no defense. If he unreasonably stopped the natural flow, he must answer therefor; but this would not make him liable over to the defendants for what is here complained of. They had no right to demand the use of a natural water course across his land to carry off water collected by them. If their conduct in failing to guard against the danger which they created was unreasonable under the circumstances, they are liable, although their conduct might have been reasonable under other circumstances.

Same—Increase of Surface Water by City.

Same—Use of Natural Flow—Defense.

It does not distinctly appear whether the verdict for the plaintiff was founded upon a failure to control the natural flow of surface water, or upon an unreasonable failure to take care of an artificial flow created by the defendants. For this reason, the case must stand for a further trial.

Same—Recommitment.

The question whether the acts were those of officers over whom the defendants had no control, and for whose acts they were not responsible, was not raised, and has not been considered.

The plaintiff's proposed amendment was objected to, both as insufficient in law, and offered at too late a day. It would seem that justice requires that the plaintiff should be allowed to restate his claim before the case again goes to trial. The question of amendment will be settled at the trial term. Case discharged. All concurred.

STATE *ex rel.* HELENA WATERWORKS CO.

v.

CITY OF HELENA *et al.*

(*Supreme Court of Montana, Dec. 17, 1900.*)

Contract for Water Supply—Constitutional Provision—Liability of City.—A city had already exceeded the constitutional limit of indebtedness. A water company furnished it water for fire, sewerage, and other municipal purposes under an ordinance providing for the obtaining of water for such purposes for a certain period, at a certain price, payable monthly, appropriating out of the city's yearly revenues sufficient money to pay for it, and ordering the city council for such term to levy annual taxes sufficient to meet the appropriation, under the Political Code of the state, authorizing the levy of taxes for general purposes. *Held*, that the company could not recover for water so furnished, under const. art. 13, § 6, providing that no city shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding 3 per centum of the taxable property therein, since, as the liability of the city would be general and not special thereunder, the contract entered into created, and the amount due for water furnished thereunder constitutes, an indebtedness within the prohibition of the constitution.

Same—Contract Void—Want of Authority.—The fact that the city council, in accordance with Pol. Code, § 4874, providing that the city council must at a certain time pass an annual appropriation ordinance sufficient to defray the expenses or liabilities of the city for the ensuing year, specifying the amount for each object, appropriated a sum to pay for water furnished under such contract, does not make the city liable therefor, since the contract out of which the liability arose is void, and no lawful authority to pay it exists.

Same—Liability of City under a General Contract.—Where the liability of a city under a contract is general, and not special, if there is no limit to the amount for which such city can become indebted for a failure on the part of the city to meet its obligations under the contract as they fell due, the other party can recover a general judgment against the city, and have a *mandamus* for the levy and collection of a tax to pay it.

Same—Limited Powers—Notice.*—Where the powers of a city to incur indebtedness are limited, it is the duty of one who makes a con-

*The charter of a city places a limit on the amount of debt to be contracted by a city. In a contract for water supply the city exceeded such amount. *Held*, that such contract was *ultra vires*, and the same was set aside. Read *v.* Atlantic City, 49 N. J. L. 558.

As to limitation of indebtedness generally, see Gamewell Fire-Alarm Tel. Co. *v.* City of La Porte, 4 Mun. Corp. Cas. 698; Wheeler *v.* City of Poplar Bluff, 3 Mun. Corp. Cas. 20, and extensive *note*; Reynolds *v.* City of Waterville, 1 Mun. Corp. Cas. 175, and *note*.

tract with such a city, whereby an indebtedness is created, to take notice of the financial condition of the city, and to determine whether the proposed indebtedness exceeds the constitutional limitation, and, not having done so, he cannot recover where the city is already indebted beyond that limit.

Appeal from Lewis and Clarke county district court. Affirmed.

Case Stated.

The appellant, in the district court of Lewis and Clarke county, made an application for a writ of mandamus requiring the city of Helena, and the city council of the city of Helena, to audit, allow, and pay certain claims for water furnished to said city during and since the month of May, 1898, under the terms of an ordinance passed by the city council of the city of Helena on the 17th day of August, 1897, and also requiring the city and said city council to appropriate sufficient of the tax levied in the year 1899 to pay the amount due and to become due under said ordinance for water furnished during the fiscal year commencing the first Monday in May, 1900.

The facts are substantially as follows: On the 16th day of March, 1897, in a suit then pending in the circuit court of the United States in and for the district of Montana, one James H. Mills was appointed receiver of the water plant owned and operated by the Helena Consolidated Water Company, and used for the purpose of supplying the city of Helena and the inhabitants thereof with water. On August 17, 1897, as stated above, the city council of the city of Helena duly passed Ordinance No. 367, entitled "To provide the city of Helena with water for fire, sewerage and other municipal purposes for a period of five years from August 1st, 1897." Among other things, said ordinance provided that James H. Mills, as receiver of the Helena Consolidated Water Company, should furnish to the city of Helena, for a period of five years from the 1st day of August, 1897, an ample and sufficient supply of good, pure, wholesome, and clear water for fire, sewerage, and other municipal purposes. The consideration for the water so furnished was the sum of $1,500 per month, payable on or before the 10th day of each day of each month, for water furnished during the preceding month. Section 11 of said ordinance is as follows: "There is hereby appropriated out of the yearly revenues of said city of Helena, for the use and benefit of said receiver, during the full term of five years from and after the first day of August, A. D. 1897, the sum of fifteen hundred dollars per month for the use of water through the present existing hydrants, by said city, for the purpose of fire, sewerage and other municipal purposes; and the further sum of five dollars and eighty-three cents per month per hydrant for each and every hydrant hereafter ordered to be erected by said city council for the use of water through the same for fire, sewerage and other municipal purposes. And

it is hereby made the duty of said city council during the term of five years to levy annual taxes under the provisions of the Political Code of the State of Montana authorizing the levy of taxes for general purposes, sufficient in amount to meet the appropriations hereby made." Said ordinance further provided that within 30 days after the passage thereof said receiver should file with the city clerk an acceptance in writing of all the terms and conditions thereof, and that immediately thereafter said ordinance should become effectual as a contract between the city and said receiver, for the purposes and upon the terms and conditions named therein. It appears from the petition that within said period of 30 days said James H. Mills, as receiver, filed his acceptance in writing of the terms and conditions of said ordinance. It further appears that since the acceptance of said ordinance water has been furnished to the city of Helena in accordance with the terms thereof, and has been used by said city for the purposes mentioned therein. It also appears that nothing has been paid for water furnished since the 1st day of May, 1898.

It is alleged in the petition that the said city of Helena levied a tax for general municipal and administrative purposes sufficient in amount to meet and discharge the appropriation made in said ordinance for the fiscal year beginning with the first Monday in May, 1898, together with all other liabilities and expenses of said city for said year; that a like tax was levied by the city council for the fiscal years commencing with the first Monday in May, 1899, and 1900, respectively, in each instance sufficient in amount to pay and discharge the appropriation made by said ordinance for each of said years, together with the other liabilities and expenses of the city. It is alleged that each year since the passage, approval, and acceptance of said ordinance the said city council has appropriated in the annual appropriation ordinance the sum of $18,000 to pay for water furnished under said ordinance. Then follows an allegation that the water plant and system of appellant is the only one in the city of Helena, and that no other person or corporation was, either at the time of the passage or acceptance of said ordinance, or long prior thereto, or is now, in a position to furnish water to said city of Helena for the purposes specified in said ordinance.

The amended answer to the petition consisted of denials of certain allegations contained therein, certain allegations not now material, and separate defenses in substance as follows: (1) That no bids were ever asked for or received prior to entering into the alleged contract between the said city and said James H. Mills, receiver, predecessor in interest of appellant; that no bids for entering into said alleged contract were ever asked or advertised for as required by the provisions of article 1 of chapter 16, relating to contracts, of the Revised Ordinances of 1897 of said city of Helena; and that when said contract was entered into a contract could have been made with

responsible parties, who would have agreed within six months thereafter to supply the said city with water for the purposes mentioned in said ordinance, from sources other than those owned or controlled by the appellant. (2) That at the time the city entered into said contract, and during all of the year 1897, as shown by the last assessment for state and county taxes, the value of the taxable property in the city of Helena did not exceed the sum of $12,656,783, and that it has not at any time since exceeded such sum; that at the ime said contract was entered into, and at all times since, the aggregate indebtedness of the city was, and still is, largely in excess of the 3 per centum of the value of the taxable property therein, as shown by all the assessments for state and county taxes made during any of the times mentioned in said petition, and was at all of said times, and still is, in excess of the sum of $516,000. To the amended answer a replication was filed. Defendant moved for judgment on the pleadings, which motion was by the court sustained. From the judgment entered upon said order, this appeal is taken.

Clayberg & Gunn, for appellant.

Edward Horsky, for respondent.

Word, J. (after stating the facts). The first question we shall consider is, did the city of Helena, by entering into the contract for a water supply, incur an "indebtedness," within the meaning of that term as it is used in section 6 of article 13 of the constitution of Montana? Section 6 of article 13 of the constitution is as follows: "No city, town, township or school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding three per centum of the value of the taxable property therein, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such city, town, township or school district shall be void: provided, however, that the legislative assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the taxpayers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality, which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt." It is admitted by the pleadings that at the time when the contract between James H. Mills, receiver, and the city of Helena was executed the city of Helena was indebted in a sum in excess of 3 per centum of the assessed valuation of the taxable property in said city, as ascertained by the last assessment prior thereto for state and county taxes. In the court below coun-

Contract for Water Supply —Constitutional Provision—Liability of City.

sel for defendants took the position that the city, thus indebted by entering into said contract, created an indebtedness, within the prohibition of the constitution. In support of this position, the case of Davenport v. Kleinschmidt, 6 Mont. 502, 13 Pac. 249, among others, was cited. In view of the fact that the respondents claim that this decision is conclusive of the questions here presented, and inasmuch as the appellant seeks to show that this case has been overruled, or, at least, should not, in the light of the facts here presented, be held to control the decision upon this appeal, we will examine the case of Davenport v. Kleinschmidt, and seek to determine if any of the questions therein decided are the same as those now presented.

The suit of Davenport v. Kleinschmidt was one for a perpetual injunction, brought against the mayor and aldermen of the city of Helena and George F. Woolston, to restrain them from carrying out a certain contract, alleged to be illegal, by laying water mains, or erecting hydrants in the city, or by issuing any warrants for any water supplied to said city under said contract. Passing over those portions of the opinion given up to matters not now material, we come to a question like unto the one now before us. We quote as follows: "But is such a contract as that proposed by the ordinance in controversy actually forbidden by the charter of the city, as is contended by the respondents? Let us examine the charter, for the purpose of pointing out the precise section imposing the restriction. It is therein prescribed 'that said city shall not be authorized to incur any indebtedness on behalf of said city, for any purpose whatever, to exceed the sum of $20,000.' Section 17, as amended by Act 1883 (page 19, Charter).

The allegations of the complaint, which, for the purpose of this case, are for the present taken as true, show the present bonded indebtedness of the city to be $19,500, and the floating debt, consisting of outstanding warrants, to be $15,000. No distinction is drawn in the charter between bonded debt and floating debt, and, from the figures presented, it clearly appears that the limit has been already reached, and that the city cannot incur any further indebtedness, until some of that outstanding has been discharged, or the limit enlarged by the legislature. Then if, by entering into the proposed contract, the city council would 'incur an indebtedness,' the same is plainly prohibited by the express terms of the charter." The court then goes on to interpret the term "indebtedness" as used in the city charter, and exhaustively reviews the decisions of Iowa, Illinois, and Indiana, wherein the meaning of constitutional provisions practically the same as those of section 6 of article 13 of the constitution of Montana is determined, and reaches the conclusion that the contract before the court involved a liability to pay money on a contingency morally sure to take place, irrespective of any action taken, or option exercised, by the city in the future, and so constituted an in-

debtedness such as was prohibited by the express terms of the charter. Among other cases cited from and commented on by the court in reaching this conclusion were Water Co. v. Woodward, 49 Iowa, 59, and Grant v. City of Davenport, 36 Iowa, 401. Counsel for appellant contend that these decisions were misinterpreted by the court in Davenport v. Kleinschmidt, and so, when carefully considered, do not support the conclusion drawn therefrom. Let us see if this is so. The supreme court of Iowa in Water Co. v. Woodward, supra, construing a constitutional provision almost identical with our own, says: "It is believed the constitution applies not only to a present indebtedness, but also to such as is payable on a contingency at some future day, or which depends on some contingency before a liability is created. But it must appear that such contingency is sure to take place, irrespective of any action taken, or option exercised, by the city in the future. That is, if a present indebtedness is incurred, or obligations assumed, which, without further action on the part of the city, have the effect to create an indebtedness at some future day, such are within the inhibition of the constitution. But if the fact of the indebtedness depends upon some act of the city, or upon its volition, to be exercised or determined at some future date, then no present indebtedness is incurred, and none will be until the period arrives, and the required act or option is exercised, and from that time only can it be said there exists an indebtedness." Commenting on the above, this court in Davenport v. Kleinschmidt held that case analogous to the one then before it. Such, in our opinion, is true, in view of the conclusions reached; for it is to be noted that the Iowa decisions are in accord with the views expressed in Davenport v. Kleinschmidt to this extent, at least, that a contract for a water supply entered into by a city which has already exceeded the constitutional limit of indebtedness, and which water supply such city is not able to pay for out of its current revenues, together with its other current expenses, is a contract within the prohibition of the constitution. The Iowa court, however, goes further, and holds "that when the contract made by the municipal corporation pertains to the ordinary expenses, and is, together with other like expenses, within the limit of its current revenues, and such taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute 'the incurring of indebtedness,' within the meaning of the constitutional provisions." Grant v. City of Davenport, supra. But this court in Davenport v. Kleinschmidt refused to adopt the construction of this constitutional prohibition against incurring indebtedness, though urged upon its attention by counsel, but, on the contrary, approved the construction given by the courts of Illinois and other states to a constitutional provision practically the same as our own.

It is said that in Davenport v. Kleinschmidt it did not

appear, as it does from the pleadings in the case at bar, that for each year since the making of the contract the city had levied and collected taxes in an amount sufficient to make the payments provided for in said contract, and to meet all the other liabilities and expenses of the city; but the authorities cited and approved by the court passed upon a like contention, and held it to be against the plain meaning of the constitution, and so without merit. Thus, in City of Springfield v. Edwards, 84 Ill. 626, the court say: "Appellant contends that when liabilities are created and appropriations are made which are within the limits of the revenue accruing to meet them, they are not 'debts,' within the meaning of the prohibition of the constitution; and that temporary loans are not, when within the limits of the revenue expected to be realized. The first branch of this position has support in Grant v. City of Davenport, 36 Iowa, 396; People v. Pachece, 27 Cal. 175; Koppikus v. Commissioners, 16 Cal. 253; State v. McCauley, 15 Cal. 455; State v. Medbery, 7 Ohio St. 522; and State v. Mayor, etc., of City of New Orleans, 23 La. Ann. 358. These cases maintain the doctrine that revenues may be appropriated in anticipation of their receipt, as effectually as when actually in the treasury; that the appropriation of moneys when received meets the services as they are rendered,—thus discharging the liabilities as they arise, or rather anticipating and preventing their existence. In considering what construction shall be given to a constitution or a statute, we are to resort to the natural signification of the words employed, in the order and grammatical arrangement in which they are placed; and if, when thus regarded, the words embody a definite meaning, which involves no absurdity, and no contradiction between different parts of the instrument, then such meaning is the only one we are at liberty to say was intended to be conveyed. There is no difficulty in ascertaining the natural signification of the words employed in the clause of the constitution under consideration, and to give them that meaning involves no absurdity or contradiction with other clauses of the constitution. The prohibition is against becoming indebted,—that is, voluntarily incurring a legal liability to pay,—'in any manner or for any purpose,' when a given amount of indebtedness has previously been incurred. It could hardly be probable that any two individuals of average intelligence could understand this language differently. It is clear and precise, and there is no reason to believe the convention did not intend what the words convey. A debt payable in the future is obviously no less a debt than if payable presently; and a debt payable upon a contingency, as upon the happening of some event, such as the rendering of service or the delivery of property, etc., is some kind of a debt, and therefore within the prohibition. If a contract or undertaking contemplates, in any contingency, a liability to pay, when the contingency occurs the liability is absolute,—the

debt exists,—and it differs from a present, unqualified promise to pay only in the manner by which the indebtedness was incurred. And, since the purpose of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses or for something else." And, as if these propositions did not cover the question, the court went further, and held it unlawful for a city indebted beyond the constitutional limit to incur a liability for current expenses or for anything else, even though it should at the same time make a formal appropriation, within the limit of its revenue, to meet it; that to avail itself of current, but uncollected, revenue for such purpose it must go further, and assign the amount out of a tax actually levied, and without recourse, in such a manner as to "leave upon the city no future obligation, either absolute or contingent, whereby its debt might be increased." Prince v. City of Quincy, 128 Ill. 443, 21 N. E. 768. In Law v. People, 87 Ill. 385, the case of City of Springfield v. Edwards, supra, is approved, the propositions above quoted therefrom are affirmed, and it is there declared that the inhibition of the constitution includes "indebtedness" of every kind and character, and in every sense of the term, no matter what the form by which it is evidenced may be, when contracted or issued after the statutory limit is reached. In Buchanan v. City of Litchfield, 102 U. S. 278, 26 L. Ed. 138, and City of Litchfield v. Ballou, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132, the construction placed upon that section of the Illinois constitution before the court in City of Springfield v. Edwards and Law v. People, supra, is approved. In the latter case, Mr. Justice Miller, speaking for the court, says: "The language of the constitution is that no city, etc., 'shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property.' It shall not become indebted. It shall not incur any pecuniary liability. It shall not do this in any manner. Neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any purpose. No matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt, in any manner, or for any purpose whatever. If this prohibition is worth anything, it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law." Such was the interpretation by the highest court in the land of this constitutional provision of the state of Illinois when our own constitution containing a like provision was adopted.

We have carefully examined those sections of our constitution wherein counsel for appellant claim an interpretation of the term "indebtedness," as used in the constitution, may be

found. The sections cited are by their terms applicable to the state alone. By them the limit of state indebtedness is fixed, as is the limit of taxation as well. In the case of cities, etc., the limit of indebtedness is fixed by the constitution, but the limit of taxation is fixed by the Code, and so subject to change. Why cities, etc., were not included within the terms of section 2, art. 13, and section 12, art. 12, we need not pause to inquire, since we find as to them an express provision, the meaning of which is now before us for determination. Nothing is said in the constitution as to the manner in which a city shall meet its current expenses. The inhibition is against a city becoming indebted in any manner or for any purpose to an amount exceeding a certain per cent. of its taxable property.

In view of these holdings, we can conceive of no possible ground for the supposed distinction between an indebtedness for current expenses, payable out of the current revenues, and one for the payment of which no provision has been made, and for which the city is generally liable. See, also, Fuller v. City of Chicago, 89 Ill. 262; Fuller v. Heath, Id. 296; Howell v. City of Peoria, 90 Ill. 104; Prince v. City of Quincy, 105 Ill. 138; City of Chicago v. McDonald (Ill. Sup.) 52 N. E. 982; City of Helena v. Mills, 36 C. C. A. 1, 94 Fed. 916; Beard v. City of Hopkinsville, 95 Ky. 239, 24 S. W. 872, 23 L. R. A. 402; Spillman v. City of Parkersburg, 35 W. Va. 606, 14 S. E. 279; People v. May, 9 Colo. 404, 12 Pac. 839; Niles Waterworks v. City of Niles, 59 Mich. 311, 26 N. W. 525; Sackett v. City of New Albany, 88 Ind. 473; Ming v. Pratt, 22 Mont. 262, 56 Pac. 279; Jay v. School Dist. (Mont.) 61 Pac. 250.

Same—Contract Void—Want of Authority.

Counsel for appellant next contend that, even if this court is of opinion that the case of Davenport v. Kleinschmidt supports the proposition that, by entering into the contract now before us, the city incurred an indebtedness such as is prohibited by the constitution, yet that case cannot be looked to as an authority, for the reason that it has been overruled by the case of State v. City of Great Falls, 19 Mont. 518, 49 Pac. 15. We do not so read this last case. At the time the contract before the court in the Great Falls Case was entered into there existed an act of the legislature conferring upon cities the power to levy and collect a tax, not to exceed five mills on the dollar, for fire and water purposes. The court said: "This law was in force when Ordinance No. 17 was passed, approved, and accepted. We are of the opinion that this law became a part of the contract embodied in said ordinance, and that relator had a right to insist that, in so far as might be necessary to pay what was due it for hydrant rentals in accordance with rates prescribed in the ordinance contract, a special tax, as provided for in that act, should be levied annually; of course, in only such sums as would be needed, and not exceeding the five-mill limit.

The contract was entered into in contemplation of a special fund being created by the city to meet liabilities incurred thereunder, and the legislature in said act contemplated at the time that cities of the territory should pay for water used by them for sewerage and fire purposes from taxes levied and collected for that specific purpose. The case of Davenport v. Kleinschmidt, supra, does not disapprove the Iowa cases holding that, because a general law provided for payment from a special fund, a liability incurred by a city to supply its inhabitants with water was not a 'debt,' in the sense of the term as employed in the constitution of Iowa, forbidding cities to incur debts in excess of a certain proportion of their assessable property. It was under different conditions of law and fact that the supreme court of the territory of Montana held in Davenport v. Kleinschmidt that the liability incurred by the city of Helena under its ordinance contract was a debt. This appears from a careful reading of the case."

The case of Davenport v. Kleinschmidt and the Great Falls Case stand for two different and distant principles. The first is an authority for the proposition that when a municipality has exceeded the constitutional limit of indebtedness a contract for a water supply, under which the city is liable generally, is the incurring of an indebtedness, within the meaning of the constitution, and the Great Falls Case is an authority for the proposition that such a contract does not create an indebtedness when the city making the contract is authorized by law to levy a special tax expressly for the payment of such contract liablility. In a case falling within the first class, the liability of the city is general, and is payable out of all its revenues. Thus, in the case at bar, section 11 of the ordinance makes it the duty of the "city council during the term of five years to levy annual taxes under the provisions of the Political Code of the state of Montana authorizing the levy of taxes for general purposes, sufficient in amount to meet the appropriations hereby made," which, as appropriated by the same section, is the sum of $1,500 per month for water furnished. In cases falling within the second class, the liability is special, and is limited to the amount of the special tax the levy of which is expressly authorized by law. So it may be said that the Great Falls Case approves, rather than overrules, the case of Davenport v. Kleinschmidt. See City of Helena v. Mills, supra. And it may be here noted that since the decision of the Great Falls Case the special tax for fire and water purposes therein considered has been abrogated by the adoption of the Codes, and the same conditions are now presented as existed at the time the case of Davenport v. Kleinschmidt was decided. City of Helena v. Mills, supra.

Counsel for appellant contend that the conclusions reached by this court in Davenport v. Kleinschmidt are in conflict with the decision of the supreme court of the United States in City of Walla Walla v. Walla Walla Water Co., 172 U. S.

1, 19 Sup. Ct. 77, 43 L. Ed. 341. With this we cannot agree. In the first place, it appears from a reading of the opinion in the Walla Walla Case that at the time the bill in equity was filed, and the preliminary injunction against the city was granted, the city of Walla Walla was not indebted to an amount in excess of the limit of indebtedness fixed in its charter. Commenting on limitations of this character, the court in the Walla Walla Case say: "The obvious purpose of limitations of this kind in municipal charters is to prevent the improvident contracting of debts for other than the ordinary current expenses of the municipality. It certainly has no reference to debts incurred for the salaries of municipal officers, members of the fire and police departments, school teachers, or other salaried employees to whom the city necessarily becomes indebted in the ordinary conduct of municipal affairs, and for the discharge of which money is annually raised by taxation. For all purposes necessary to the exercise of their corporate powers, they are at liberty to make contracts regardless of the statutory limitation, provided, at least, that the amount to be raised each year does not exceed the indebtedness allowed by the charter. Among these purposes is the prevention of fires, the purchase of fire engines, the pay of firemen, and the supply of water by the payment of annual rentals therefor. It is true that in the case of Lake Co. v. Rollins, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060, it was held by this court that a similar provision in the constitution of Colorado was an absolute limitation upon the power to contract any and all indebtedness, including warrants used for county expenses, such as for witness and jurors' fees, election costs, charges for board of prisoners, county treasurers' commissions, etc. But the case is readily distinguishable from the one under consideration. That was a suit against a county upon a large number of warrants for current expenses, the defense being a want of authority on the part of the county commissioners to issue warrants which had been put forth after the limit of indebtedness had been reached and even exceeded. They were held to be void. The case is authority for the proposition that if the annual rentals, payable in this case, with the other expenses, exceeded the limit of indebtedness, the transaction would be void; but as it appears that the limit of indebtedness was $50,000, and the amount of the city debt but $16,000, it is clear that the payment of an annual rental of but $1,500 would be unobjectionable upon this ground. If such annual rentals exceeded the limit of indebtedness, a different question would be presented." The Walla Walla Case is an authority for the proposition "that the contract of a municipal corporation for a useful and necessary thing, such as water or light, which is to be paid for annually as furnished, does not create an indebtedness for the aggregate sum of all the yearly payments, since the debt of each year comes into existence only when the annual com-

pensation has been earned, but that, if the amount agreed to be paid in any installment in compliance with such contract transcends the amount of permitted indebtedness, the city is not liable therefor." City of Helena v. Mills, supra, and cases cited. With the city already indebted when the contract before us was made, in a sum largely in excess of the constitutional limit, how can it be said that the amount to be raised each year under the contract does not exceed the amount of indebtedness permitted by our constitution? A fortiori is this true when the water rent and the other expenses of the city for each year are taken together, as they must be, under our understanding of the constitution. If, by entering into the contract before us, an indebtedness was not created, what was the purpose of section 11 of the ordinance, wherein the city bound itself during the term of five years to levy annual taxes under the provisions of the Political Code authorizing the levying of taxes for general purposes to pay for water supplied under the contract? It may well be said that this obligation in itself implied the existence of a debt in favor of appellant and against the city. It follows, from the view we have taken of the propositions before us, that the question asked in the beginning of this opinion must be answered in the affirmative.

2. The next question presented for our consideration is this: Does the amount now due and unpaid for water furnished to the city under the contract before us constitute an "indebtedness," within the meaning of the term as used in that section of the constitution above considered? This question is virtually answered by the conclusion we have already reached. Holding, as we do, that the contract itself is void, any obligation flowing from it is void also. This view accords with that portion of section 6, art. 13, supra, wherein it is declared "that all bonds or obligations in excess of such amount [the limit of indebtedness] given by or on behalf of such city," etc., "shall be void." Nor can it make any difference, in our opinion, that the city council, in accordance with the provisions of section 4874 of the Political Code or otherwise, appropriated $18,000 or other sum to pay for water furnished under said contract for a given year. The contract out of which these liabilities arose being void, it necessarily follows that no lawful authority to pay them exists. As we have indicated, the liability of the city under the contract before us, if any existed, would be general, not special, and, were there no limit to the amount for which the city could become indebted, for a failure on the part of the city to meet its obligations for water rent as they fell due, the appellant could recover a general judgment against the city, and have a mandamus for the levy and collection of a tax to pay it. Counsel for appellant say that the logical result of holding that the constitution prohibits a contract for current expenses which a city can meet out of its current revenues

Same—Liability of City Under a General Contract.

together with its other current expenses is that the city government must end; that the city cannot pay one dollar out of its treasury for the necessities to sustain corporate life. Were it true that such dire results would flow from giving force to the plain terms of the constitution, it were better so than that this court should, by a loose construction of that instrument, endanger those sacred rights which by its terms are guarantied to all the people. Palmer v. City of Helena, 19 Mont. 68, 47 Pac. 209. But that no such results need follow from the construction we give to this provision of our constitution is made plain by a consideration of the course pursued in those states where a like interpretation of a similar constitutional provision is adhered to. "The effect of this constitutional inhibition is to require cities indebted to the limit fixed by the constitution to carry on their corporate operations, while so indebted, upon the cash or pay as you go plan, and not upon credit, to any extent or for any purpose." Prince v. City of Quincy, 128 Ill. 443, 21 N. E. 768. A way in which, under such circumstances, the operations of a city may be carried on is pointed out in City of Springfield v. Edwards, supra; and in commenting thereon in Law v. People, supra, the court say: "The theory is that a corporation which has reached the constitutional limit of its power to create indebtedness may, when a tax is levied, but not collected, draw against the fund thus levied and provided, although not in the treasury, and thus appropriate, and virtually assign, the amount specified in the warrant on the treasury to the person to whom it is issued and delivered, and that amount, being assigned or set a part to him, when collected, he has the right to receive, and it becomes the duty of the officers to collect and pay it to him; and, failing in their duty, he would have an action against them for its recovery. But, with a corporation thus situated, the legal effect of the issuing and receiving of the warrant is that the person receiving an assignment or appropriation of so much of the specific tax already levied, and against which the warrant is drawn, by receiving it discharges the corporation from all liability on account of the services or articles for which it is drawn, and agrees to look to the tax thus levied and appropriated, and to the officers, for his pay, and he thereby discharges the corporation from any and every kind of liability therefor. In such a case the warrant is given and received in full satisfaction for the services rendered or the material furnished." See Lake Co. v. Rollins and People v. May, supra.

From the view we take of the question considered, it follows that the answer to the second question must also be in the affirmative. This makes it unnecessary for us to pass upon the other questions presented on this appeal.

It may be the decision of this case will work a hardship upon those whose money has been the means of supplying the city with water for the time disclosed by the pleadings. In this re-

gard, "it is only necessary to say that the settled principles of law cannot, with safety to the public, be disregarded in order to remedy the hardships of special cases." Buchanan v. City of Litchfield, supra; Sanford v. Gates, 21 Mont. 277, 290, 53 Pac. 749; Lake Co. v. Rollins, supra. And in this connection it is to be observed that, where the powers of a city to incur indebtedness are limited, it becomes the duty of one who contracts with such a city, whereby an indebtedness is created, to take notice of the financial condition of the city, and to determine whether the proposed indebtedness is in excess of the constitutional limitation. French v. City of Burlington, 42 Iowa, 617; Buchanan v. City of Litchfield, supra.

Same—Limited Powers—Notice.

The importance of this case, because of the questions and amount involved, and the rights necessarily to be determined, has led us to give it most careful consideration, and, after so doing, we are of opinion that the judgment of the court below should be affirmed; and it is so ordered. Affirmed.

Brantly, C. J., and Pigott, J., concur.

HADLEY

v.

DAGUE.

(*Supreme Court of California, Oct. 4, 1900.*)

Improvement of Street—Acceptance by Superintendent—Expiration of Contract Before Acceptance—Validity.—Where a contract for a street improvement requires the work to be performed to the street superintendent's satisfaction, and fixes a time for its completion, the fact that the council, after the expiration of the time limited, and its acceptance by the superintendent, sets aside the assessment for defects in the work, and the superintendent's acceptance, and requires the defects remedied under its direction, does not invalidate a subsequent assessment, on the ground that the contract had expired before the subsequent acceptance of the work, since the contractor, by the completion of his work within the time limited, had sufficiently fulfilled his contract so as to prevent a forfeiture by the council's subsequent disapproval.

Same—Statutory Authority—Issuance of Warrants.—Under the street improvement act (St. 1891, p. 205, § 9), authorizing issuance of warrants to the contractor, his agents or assigns, for the several assessments, a warrant is not invalid because issued in the name of an assignee of the original contractor.

Same—Same—Serial Bonds.—Under Act Feb. 27, 1893, authorizing serial bonds, to represent the cost of an improvement, and requiring to be included in the warrant a notice that a bond will issue to represent each assessment of a certain sum, and describing the bonds, a reference

to the bonds in the warrant as serial bonds bearing interest at a certain rate, and extending over a certain period from date of issue, to represent the costs and expenses of the work described in the assessment, and reciting that notice is thereby given that a bond in such series will issue, to represent each assessment of a certain sum, sufficiently complies with the requirements.

Same—Refusal of Work—Rights of Contractor.—Where, under a contract for a street improvement, the work is to be performed under direction of the street superintendent, who afterwards states on the assessment that the work has been done under his direction, to his satisfaction and acceptance, and the council refuses to approve the work and orders its completion under its direction, such superintendent, by a subsequent indorsement, on the assessment that the work was not under his supervision and control, and was not accepted by him, cannot deprive the contractor of the benefit of the previous indorsement.

Evidence—Warrant—Prima Facie of Correctness—Engineer's Certificate.—Under the street improvement act (St. 1891, p. 205, § 9), requiring the street superintendent to record in his office the warrant and assessment, with the engineer's certificate, after which they shall be delivered to the contractor, and shall be *prima facie* evidence of the correctness of the assessment, where the superintendent's indorsement of an engineer's certificate shows that it has been recorded, the fact that such certificate itself fails to show that it has been recorded is immaterial.

Same—Construction of Statute.—Where a city, in ordering street improvements finds that the cost will be greater than one dollar per front foot along each line of the street, "including the cost of intersections," and pursuance to Act Feb. 27, 1893, directs serial bonds issued to represent the cost, in an action to enforce the assessment an objection to the finding on the ground that the act of 1893 prescribes as a condition on which bonds may issue a finding by the council that the cost will be greater than one dollar per front foot along the line of the street, "including the cost of intersection work assessable upon said frontage," will be disregarded, as the council must be deemed to have used the phrase "cost of intersection" with reference to the matter on which it was acting, and as such is equivalent to the condition of the statute.

Same—Front-Foot Rule—Proof.*—The street improvement act (St. 1891, p. 196, c. 147) cannot be held unconstitutional, as making an arbitrary apportionment of the expenses according to the frontage of the lots and not requiring that the assessment on each lot shall be made in proportion to the benefits received by that lot, so as to invalidate an assessment thereunder without proof showing the assessment to be unjust.

Department 1. Appeal by defendant from Los Angeles county superior court. Affirmed.

Barclay & Camp, for appellant.

Jones & Weller and Finlayson & Finlayson, for respondent.

*See Barber Asphalt Pav. Co. *v.* French *et al.* (Mo.), 4 Mun. Corp. Cas. 744. As to local assessment generally, see Homing *v.* McCarthy, 3 Mun. Corp. Cas. 251, and *note*, 257 *et seq.*

Hadley *v.* Dague

Harrison, J. Action upon a street assessment. The common council of the city of Los Angeles passed an ordinance for the improvement of Main street, in that city, between Ninth and Thirty-Seventh streets. Plans and specifications, together with an estimate of the cost of the work, were furnished by the city engineer prior to the passage of the resolution of intention; and in that resolution the city council declared that it found upon such estimate that the cost of the improvement would be greater than one dollar per front foot along each line of the street, including the cost of intersections, and that in accordance with the provisions of the act of February 27, 1893, serial bonds extending over a period of 10 years would be issued to represent its cost. After the completion of the work, and issuance of the assessment therefor, demand and return of nonpayment were made thereon. Thereafter the appellant, whose property had been assessed for its proportion of the cost of the work, notified the city treasurer, in accordance with the provisions of the aforesaid act, that he desired no bond to be issued for the assessment against his land, and accordingly no bond therefor was issued. The assessment not being paid, the present action was brought for its enforcement by a sale of the land. Judgment was rendered in favor of the plaintiff and a new trial denied, from which defendant has appealed.

Case Stated.

The contract for doing the work was entered into May 6, 1896, and provided that the work should be completed within 250 days from its date; i. e. on or before January 11, 1897. Before the expiration of this time the contractor did all the work named in the contract and specifications to the satisfaction of the street superintendent; and on December 4, 1896, the superintendent accepted and approved the work, and made and issued an assessment to cover the sum due therefor. Thereafter, and prior to January 1, 1897, certain owners who were assessed for a portion of the expense of the work appealed therefrom to the city council, stating as the grounds of their appeal that the work had not been performed in a good and substantial manner. March 23, 1897, the city council passed a resolution wherein it found that the work was defective in certain respects, and not in accordance with the requirements of the contract, and vacated and set aside the warrant and assessment, and also the action of the superintendent in accepting the work, and directed the contractor to remedy said defects "under the direction of said city council." At the same time the council extended the time for the completion of the work under said contract until the 1st day of July, 1897. The contractor thereupon, under the authority of this resolution, did whatever work was required to comply with its requirements, and completed the same on the 15th of May to the satisfaction of the city council and the superintendent of streets. June 7th the council passed a resolution accepting

the work, and directing the superintendent to make a new warrant, assessment, and diagram therefor, and on June 26th that officer made the assessment upon which the present action is brought.

1. Upon these facts the appellant contends that as the work was not completed within the period of 250 days from the date of the contract, and as the subsequent extension was not made until after the expiration of that period, the contract had expired before the acceptance of the work, and the assessment therefor was invalid and created no lien. We are of the opinion, however, that this objection cannot be sustained. The contract provided, in accordance with the express requirements of the statute, that the contractor would do and perform the work "under the direction and to the satisfaction of the street superintendent." The provision therein fixing 250 days as the time for the completion of the work must refer to the completion of the work according to the terms of the contract,—that is, to the satisfaction of the street superintendent and under his direction; and, in the absence of any charge of fraud or collusion, it must be held that, upon such completion of the work within the time limited, the contractor had sufficiently fulfilled the condition of his contract to prevent a forfeiture thereof by reason of the subsequent disapproval by the city council of such acceptance. The utmost that could be claimed in support of the appellant's contention would be that, if the superintendent's acceptance was set aside, the time thereafter required for the final completion of the work should be counted as a portion of the time originally fixed for its completion. While the appeal from the act of the superintendent in accepting the work was pending before the council and undetermined, the running of the time originally fixed for the completion of the work was suspended, and the work was completed within the time granted by the council at the time it set aside the superintendent's acceptance.

Improvement of Street—Acceptance by Superintendent—Expiration of Contract Before Acceptance—Validity.

2. The contract was originally awarded to John T. Long, and before its completion was assigned to the Western Contracting & Construction Company. The warrant issued with the assessment was in favor of "the Western Contracting & Construction Company, assignee of John T. Long, agents or assigns." The appellant contends that the warrant should have been issued in the name of the original contractor, and that its issuance in favor of his assignee was unauthorized. The form of warrant which is prescribed in the street improvement act in terms authorizes and empowers the contractor, his agents or assigns, to demand and receive the several assessments, and the act declares that the warrant to be issued shall be "substantially" in this form. The right of the contractor to assign the contract prior to the completion of the work is recognized in many portions of the act, and has been recognized by this

Same—Statutory Authority—Issuance of Warrants.

court. Anderson v. De Urioste, 96 Cal. 404, 31 Pac. 266. After he has ceased to have any interest in the contract, or in the assessment therefor, there would seem to be no reason for the issuance of the warrant in his name, especially since the statute does not specifically require it. Sections 9 and 10 of the act designated the assignee as the proper person to whom the warrant and assessment are to be delivered. We hold, therefore, that a warrant in favor of one who is therein named as the assignee of the original contractor, whose name is also given, is "substantially" in the form prescribed in the act. Proof was made at the trial herein that such assignment had been made by the original contractor.

3. It is further objected that the reference in the warrant to the issuance of bonds, as provided by section 3 of the aforesaid act of February 27th, is insufficient. The reference to the bonds in the warrant is as follows: "Serial bonds bearing interest at the rate of six per cent. per annum, and extending over a period of ten years from their date of issue, to represent the costs and expenses of the work described in the assessment, and in the manner and form prescribed by law; and notice is hereby given that a bond in such series will issue to represent each assessment of fifty dollars or more remaining unpaid for thirty days after date of this warrant, or five days after the decision of the city council upon an appeal." We deem this to be a sufficient compliance with the act of 1893. That act requires that there shall be "included in the warrant" "a notice that a bond will issue to represent each assessment of fifty dollars or more remaining unpaid for thirty days after the date of the warrant, or five days after the decision of said council, upon an appeal, and describing the bonds." The warrant in question contains both a description of the bonds and the notice thus specified.

Same—Same—Serial Bonds.

4. Upon the assessment offered in evidence was the following indorsement: "The foregoing work was performed under the supervision of, and was accepted by, the Los Angeles city council. Said work was not under my control or supervision at any time, and was not accepted by me. I hereby disclaim all responsibility for said work, and I sign and deliver this assessment and warrant upon the order of, and the authority of, said city council. J. H. Drain, Street Supt." The appellant contends that, by reason of this indorsement, it appears that the work was not done under the direction and to the satisfaction of the superintendent of streets, and therefore the prima facie character which the statute gives to the evidence offered by the plaintiff was destroyed. Upon the face of the assessment the superintendent had declared, "All of said work has been performed and materials furnished, complying with the specifications, and under my direction, and to my satisfaction and acceptance," and had authenticated the same by his official signature. It does not appear at what time the above in-

Same—Refusal of Work—Rights of Contractor.

dorsement was made upon the assessment, but it must be held that it was not competent for that officer, after having made and authenticated the assessment in his official capacity, to qualify it by indorsing thereon a direct contradiction of the facts therein stated. Moreover, when the city council vacated the former assessment it directed the contractor to perform the work required by it "under the direction of the said city council," and that when so done the superintendent should accept the work, and issue a new warrant, assessment, and diagram. These directions were in strict accordance with the provisions of section 11 of the street improvement act, and the above indorsement of the superintendent is not inconsistent therewith.

5. The certificate of the engineer, offered in evidence, did not show that it had ever been recorded, but was indorsed: "Recorded ——, 189–, ——, Superintendent of Streets." The act requires that the superintendent shall record the warrant, assessment, and diagram, together with the certificate of the engineer, in his office, and that after they are recorded they shall be delivered to the contractor; and it also declares that these documents, with the affidavit of demand and nonpayment, shall be prima facie evidence of the regularity and correctness of the assessment, and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment, and diagram are based, and like evidence of the right of the plaintiff to recover in the action. It does not require that the evidence of the recording shall constitute a portion of the prima facie evidence which is sufficient to entitle the plaintiff to recover. No evidence was offered tending to show that the certificate had not been recorded, and the prima facie charter which the statute gives to the above evidence offered by the plaintiff includes its proper recording. Improvement Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802.

Evidence—Warrant—Prima Facie of Correctness—Engineer's Certificate.

6. For the same reason the objection to the finding by the city council in reference to the cost of the improvement must be disregarded. The objection to the sufficiency of this finding is that the language of the resolution wherein it is made is that such cost will be greater than $1 per front foot along each line of said street, "including the cost of intersections," whereas the statute prescribes, as a condition upon which bonds for the improvement may be issued, that the council shall find that the cost will be greater than $1 per front foot along the line of the street, "including the cost of intersection work assessable upon said frontage." The line of the proposed work herein included 24 intersections of cross streets, and the city engineer had presented an estimate that the probable cost of the work per front foot on each side of the street would be $4.90. The act requires that only one-half of the cost of an

Same—Construction of Statute.

intersection shall be assessed upon the frontage of the street along which the improvement is made, and it is therefore urged that it was not shown that the cost of the work, "assessable upon the frontage," would be more than $1 per front foot. The council must be deemed to have used the phrase "cost of intersection" with reference to the matter upon which it was acting, and as so used the expression must be regarded as equivalent to the "cost of the intersection work assessable upon said frontage." The record does not show what was the width of any of the intervening streets, or the length of the several blocks of Main street, and we cannot say from any calculation whether the finding of the council was incorrect; but, as it must be assumed that these dimensions had been officially declared and were known to the council, it must be held that the prima facie character of the plaintiff's evidence was not overcome. The council was not required to find the exact cost per front foot, but only to determine whether it would be greater than one dollar per front foot. It was not necessary that the council, before passing an ordinance for the improvement of the street, should, by a separate ordinance, find the cost of the improvement. Such finding could be made and included in the ordinance declaring its intention to order the improvement.

7. It is next contended by the appellant that the assessment is invalid by reason of the unconstitutionality of the statute under which it was made, in that the statute makes an arbitrary apportionment of the expense according to the frontage of the lots, and does not require that the assessment upon each lot shall be made in proportion to the benefits received by that lot. The constitutionality of the statute has been upheld by this court so frequently that it is not an open question, but the appellants insist that the decision in Village of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, wherein it was held that the assessment therein considered was in contravention of the constitution of the United States, is at variance with these decisions, and requires them to be disregarded. If the facts and statute under which the present assessment was made were of the same character as those involved in that case, we would without hesitation accept that decision as conclusive upon us; but we are of the opinion that there is a marked distinction between the two cases, and that that decision is not applicable to the facts herein. In Village of Norwood v. Baker the question considered by the court was the validity of an assessment for the costs of opening a new street, including the value of the land taken and the costs of its condemnation, and whether the same could be taxed upon the owners of the land abutting upon that taken, irrespective of any consideration of the benefits received by that land. The assessment therein involved did not include any of the expense of improving an existing street, and whether such ex-

Same—Front-Foot Rule—Proof.

pense may be assessed upon lands fronting upon the street within certain limits designated by the legislature was not presented or discussed in the opinion; and, although the "improvement" of the street is frequently mentioned in the opinion, this expression is to be read in the light of the question to be determined by the court upon the facts before it. The village of Norwood desired to open and extend Ivanhoe street for the distance of 300 feet from its termination, through the lands of Mrs. Baker, and for that purpose instituted proceedings for the condemnation of a portion of her land 50 feet in width. The constitution of Ohio required that the compensation to be paid to the owners of land thus taken should be made in money, and should be assessed without deduction for benefits to any other property of the owner, and the statute required that the cost and expense should be assessed only on the land bounding and abutting thereon. The ordinance for the condemnation provided, as authorized by the statute of Ohio, that the entire cost of the proceedings, including the money paid for the land, should be assessed per front foot upon the property bounding thereon. In the proceedings for the condemnation of the land, its value was assessed at $2,000, and this amount of money was paid to Mrs. Baker out of the public treasury. Thereafter an assessment—the assessment in question—for the amount so paid to her, together with the costs incurred in the condemnation, was made, under the above statute, against the two portions of her lot remaining upon either side of the land which had been condemned for the street. It is thus seen that the assessment was not made for the cost of any improvement of any existing street, wherein it may be presumed that the adjacent lots are benefited, but was made solely for the purpose of reimbursing the public treasury for the expense of opening a new street. Its effect was to compel Mrs. Baker, under the guise of an assessment, to pay back into the treasury not only the money that she had received as compensation for the land taken from her, but also the expense that had been incurred in its condemnation. This was, in effect, the imposition of a tax upon her land for the purpose of reimbursing the treasury for the money which it had paid out for the use of the whole public. The proceeding was a direct sequence in the exercise by the village of its right of eminent domain, since the exercise of this sovereign power includes the payment to the owner for the land, as well as the determination that the taking is necessary for a public use. The mode in which the village could reimburse itself for such payment was by means of taxation, and, if the exercise of this power was not to be borne equally by the whole public, it could be imposed only upon those who were determined to have been actually benefited by the improvement. It needs but little argument to show that by these proceedings Mrs. Baker's property was taken for a public use without any compensation therefor; and inasmuch as,

under the constitution of Ohio, she was entitled to receive compensation in money for the whole value of the property taken, irrespective of any benefits to her remaining property, the court very readily held that she was compelled, under the guise of an assessment, to part with her property without due process of law.

The principle invoked, that the assessment must be in proportion to benefits, was not disputed in the case, the only question being as to the application of that principle to the facts before the court; and its conclusion was reached by reason of the inhibition of the statute and constitution of Ohio from considering whether the land assessed had received any benefit by reason of the opening of the street. In no portion of the opinion is it intimated that an assessment for the improvement of an existing street upon the lands abutting thereon, according to their frontage, within the district designated or prescribed by legislative authority, is invalid; nor did the court question the correctness of any of its previous decisions, many of which are cited in the opinion, in which assessments under such a rule had been sustained. In Mattingly v. District of Columbia, 97 U. S. 692, 24 L. Ed. 1098, that court had said: "Special assessments for special road or street improvements very often are oppressive, but that the legislative power may authorize them to be made in proportion to the frontage, area, or market value of the adjoining property, at its discretion, is, under the decisions, no longer an open question." In Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270, it had said: "The class of lands to be assessed for the purpose [of a public improvement] may be either determined by the legislature itself by defining a territorial district or by other designation, or it may be left by the legislature to the determination of commissioners, and may be made to consist of such lands, and such only, as the commissioners shall decide to be benefited. The rule of apportionment among the parcels of land benefited also rests with the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the land, or in proportion to the benefits as estimated by commissioners,"—citing in support thereof "the very able opinion" of Judge Ruggles in People v. Brooklyn, 4 N. Y. 419, and many other cases. In Irrigation Dist. v. Bradley, 164 U. S. 176, 17 Sup. Ct. 56, 41 L. Ed. 369, the court held that an ad valorem assessment for local improvements was not of itself a violation of the principle upon which it should be made, saying: "It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received which is open to the discretion of the state legislature, and with which this court ought to have nothing to do,"—and cites in support of this principle Cleveland v. Tripp, 13 R. I. 50, saying that it is a case "which treats this

subject with great ability," and in which the supreme court of Rhode Island upheld an assessment for a sewer upon the abutting property, which was "mathematically determined by area and frontage," as constitutional and valid.

The mode in which the expense of the local improvement shall be borne, as well as the district which is to bear such expense, and the manner in which the expense is to be distributed, is a legislative question. The principle upon which the expense is charged on the property in that district is that that property has received a particular benefit. But, as was said by Mr. Justice Temple in Lent v. Tillson, 72 Cal. 428, 14 Pac. 71, "The benefit is not the source of the power." Nor does the validity of the assessment depend upon the ability to show that the property assessed was specifically benefited by the amount of the assessment, or received that particular amount of benefit. Courts will uphold an assessment made upon such legislative authority, even though the benefits are not shown to be identical with the burden. In Litchfield v. Vernon, 41 N. Y. 123, the legislature had authorized the improvement of a street, and designated the district upon which an assessment for the expense thereof should be made. The court said: "This local assessment, it is apparent, was based upon the ground that the territory subjected thereto would be benefited by the work and change in question. Whether so benefited or not, and whether the assessment of the expense should, for this or any other reason, be made upon the district, the legislature was the exclusive judge." In Walston v. Nevin, 128 U. S. 582, 9 Sup. Ct. 192, 32 L. Ed. 544, the court said: "The determination of the taxing district and the manner of the apportionment are all within the legislative power." In Village of Norwood v. Baker the court said (page 278, 172 U. S., page 190, 19 Sup. Ct., and page 447, 43 L. Ed.): "According to the weight of judicial authority, the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvements."

The provision in the street improvement act of this state that in cases where, in the opinion of the city council, the work of the improvement is not "of more than local or ordinary public benefit," the cost of any street improvement shall be assessed as an entirety upon the lots and lands fronting upon the improvements, and shall be apportioned between the several lots therein according to their frontage, is a declaration by the legislature that, in the judgment of that body, the property within that district will receive a benefit from the improvement in proportion to its frontage upon the work. Unless, therefore, it is made to appear upon the face of the proceedings, or by some competent showing, that there is a gross or substantial variation from this principle, it is the duty of courts, under the rules and authorities above cited, to uphold

the assessment. Before the judiciary would be justified in holding an assessment to be invalid, it should be made to appear that it is, as was said in Village of Norwood v. Baker, "in substantial excess of the benefits," or, as was said in Cleveland v. Tripp, that it "palpably transgresses" the principle upon which it is authorized. In Irrigation Dist. v. Bradley, supra, the court said: "The way of arriving at the amount may be, in some instances, inequitable and unequal; but that is far from rising to the level of a constitutional problem, and far from the case of taking property without due process of law." In Lent v. Tillson, supra, the court said: "The benefits need not be immediate. I see no just limitation in this respect, except that a tax will not be upheld when the courts can plainly see that the legislature has not really exercised its judgment at all, or that manifestly and certainly no such benefit can or could reasonably have been expected to result. The judge should not place his mere opinion against that of the legislature." In Sears v. Board, 173 Mass. 71, 53 N. E. 138, the case of Village of Norwood v. Baker was invoked against the legality of an assessment which had been made in proportion to the frontage of the property bordering upon the improvement; but the court held that the statute authorizing such assessment was not unconstitutional in its application to the facts of that case, saying: "No facts appear in the present case to show that this rule is not proper in its application to the petitioners' property as a method of determining benefits with such approximation to accuracy as can reasonably be required." See, also, Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920. There is nothing in the record herein tending to show that the appellant is entitled to invoke the principle upon which he relies to defeat the assessment. He made no objection of this nature in the court below in his answer to the complaint, nor did he offer any evidence in support of such objection, but has presented it here for the first time, in his brief in reply to the respondent. In the absence, therefore, of any facts showing that the assessment is unjust, it must be held that the statute cannot be deemed unconstitutional. The judgment and order are affirmed.

We concur: Garoutte, J.; Temple, J.

CHICAGO, R. I. & P. RY. CO. *et al.*

v.

CITY OF OTTUMWA *et al.*

(*Supreme Court of Iowa, Oct. 23, 1900.*)

Local Assessments—Municipal Powers.—The right of a municipal corporation to levy local assessments depends on statutory enactment, and has no existence unless conferred by statute. And general authority to levy taxes for municipal purposes is insufficient to confer such right; and a statute conferring the right is strictly construed in favor of the person against whom the assessment is levied.

Same—Same—Railroad Right of Way—Statutes.*—A railroad right of way in a city street acquired by condemnation proceeding is a mere easement, and not a lot or parcel of land subject to a local assessment under a statute authorizing a city to pave and curb any highway therein, and to levy special assessments on the "lots and parcels of land fronting on the highway." And authority to levy such an assessment is not conferred by any of the other statutes of Iowa relied on by appellees.

Appeal—Review.—Whether the statutes and ordinances in question were unconstitutional, because of the arbitrary assessment per front foot for which they provided, was not determined, as the question was not raised by the pleadings, or presented to the lower court.

Whether Railroad Right of Way Assessable for Local Improvements—Query.—The question whether the legislature has power to authorize the assessment of railway rights of way for local improvements was left open for further consideration when it should properly arise.

Right to Sue—Absence of Priority.—The mere fact that a lessee railroad company by the terms of the lease is bound to pay all taxes and assessments of value made on the leased property does not render it personally liable for a local assessment on the property to the contractor who did the work.

Local Assessments—Validity—Notice.—The contention that no notice was given the property, and that, therefore, the local assessment in question was invalid, was not warranted by the facts.

Appeal by railway from Wapello county district court. Reversed.

Geo. W. Seevers, Carroll Wright, and Robert Mather, for appellant Chicago, R. I. & P. Ry. Co.

Carroll Wright, for appellant Keokuk & D. M. Ry. Co.

McNett & Tisdale and W. W. Epps, for appellees city of Ottumwa and its officers.

E. M. Sharon, for appellees Edward Walsh Co.

*As to assessment of railroads' right of way, see Kansas City P. & G. Ry. Co. *v.* Board of Waterworks Imp. District, *ante*, page 19.

Chicago, etc., Ry. Co. *v.* Ottumwa

Deemer, J. The case was tried on an agreed statement of facts, from which we gather the following: The Keokuk & Des Moines Railway Company acquired by condemnation proceedings a right of way across certain lots in the city of Ottumwa abutting on Main street. This right of way was used by the Chicago, Rock Island & Pacific Railway Company at the time the assessment in question was levied under a lease from the Keokuk & Des Moines Company, terminating December 19, 1923, by the terms of which the Rock Island Company agreed to pay "all lawful taxes and assessments of value made of the property after the commencement of the lease." In the year 1894 the city council of the city of Ottumwa, by resolution, ordered the paving and curbing of East Main street, and in 1895 a contract therefor was entered into by the city with the defendant the Edward Walsh Company. The paving and curbing was to extend along Main street, and adjacent to the right of way, 716½ feet, and was to be 33 feet in width between the curbs. The right of way was 3 or 4 feet from the south curb, and extended for the entire distance named. The property on the north side of the street was divided into lots and blocks, and was owned by various persons. By the terms of the contract the construction company undertook to keep the improvement in repair for the term of seven years. Pursuant to contract, the Walsh Company made the improvement, and after the completion of the work the city engineer made a plat thereof, in which he assessed the cost of 7 feet in width to a street-railway company that occupied the south side of the street, not far from the curb, with its track, and of 13 feet in width for the entire distance to the Rock Island Railway Company and the right of way. The balance of 13 feet was assessed against the property lying on the north side of the street under the front-foot rule. Nothing was allowed the railway company for street intersections. No notice was given the Rock Island Company of the intent to assess any portion of the cost of the improvement against it, save that its name was included on the plat made by the city engineer, and no notice of any kind was given the Keokuk Company. On June 25, 1895, the Rock Island Company served the city and the contractor with notice to the effect that it would contest the right of either to charge any portion of the cost against the right of way occupied by it. July 15th the city council accepted the work, and approved the assessment made by the city engineer. Thereafter notice was given directed generally to property holders, and referring to the engineer's plat, as follows: "Take notice that there is now on file in the office of the city clerk at the city hall in the city of Ottumwa, Iowa, a plat of paving districts Nos. 12 and 49. Paving district No. twelve (12) consists of East Main street from the east side of Birch street to the west side of Ash street. Paving district No. forty-nine (49) consists of that portion of Fifth street from the east line of

Case Stated.

Court street to the west line of Jefferson street, in Ottumwa, Iowa. Said plat, among other things, shows the separate lots and parcels of ground abutting thereon subject to assessment of said improvement, the number of front feet abutting thereon, the owners thereof, the amount of assessment proposed to be made against each of the said lots and parcels of ground, and the owner thereof." On August 5th, and before final ratification and approval of the assessment, the Rock Island Company filed a protest against the same, stating its reasons therefor. Thereafter the council approved the assessment, ordered it certified to the county auditor, and later issued certificates of assessment to the construction company. Plaintiff then brought this suit to restrain the collection of the assessment. The Keokuk & Des Moines Company was made a party defendant, as heretofore stated. The trial court dismissed the petition, and rendered judgment against both companies for the amount of the assessment, with 10 per cent. interest, and costs of collection, and made the same a lien on the right of way of the Keokuk Company. There was but a single railway track located on the right of way, and this is in a cut of from three to seven feet below the street level. The strip of ground between the south curb and the north line of the right of way, of three or four feet in width, is so occupied with telegraph, electric railway poles, etc., that a sidewalk cannot be built thereon, and it is not used by foot passengers. Main street does not lead to the freight depot of either railway company, but travelers may take it in going to the passenger depot. The main passenger depot in the city is within half a block of Main street, and there is no other street between it and the depot. Main street is, however, one of the principal streets in the defendant city. These facts are recited at this time in view of the contention made by the railway companies to the effect that the paving was of no benefit to them, or to their right of way or property, and that the assessment was without authority of law. The main points contended for are: First, that the right of way is not subject to special assessment; second, that no lien can be established against a right of way secured by condemnation proceedings, and that no sale thereof can be made on judicial process; third, that the statute and ordinances charging the cost of the improvement under the front-foot rule, and without regard to benefits, are unconstitutional; fourth, that no benefits were conferred by the improvement; fifth, that plaintiff company is not liable for the cost of the improvement, because it is a mere lessee of the right of way; sixth, that because no notice was ever given the Keokuk Company of the assessment against its property, or of the proceedings connected therewith, no judgment can be rendered against it; seventh, that the court cannot cure any errors in the assessment, and had no power to enter judgment against any one not a party to the original proceedings; and, eighth, that the allowance of inter-

est and collection charges was erroneous. Such of these points as fairly arise on the record we will consider in the order stated.

Local Assessments—Municipal Powers.

The first and most important—aside from the constitutional—question relates to the right of a city to assess the cost of paving and curbing against the right of way of a railway company acquired by condemnation proceedings. No citation of authorities is needed in support of the fundamental principle that the right of a municipality to levy special assessments depends on statutory enactment, and that it has no existence unless there be a valid statute conferring it. But see Polk Co. Sav.. Bank v. State, 69 Iowa, 24, 28 N. W. 416; In re Second Ave. Church, 66 N. Y. 395; Niklaus v. Conkling, 118 Ind. 289, 20 N. E. 797. General authority to levy taxes for municipal purposes is insufficient to confer the power, and a statute conferring such power is strictly construed in favor of the person against whom the assessment is levied. See cases last above cited and Hager v. City of Burlington, 42 Iowa, 661; Reed v. City of Toledo, 18 Ohio, 161; Starr v. City of Burlington, 45 Iowa, 87; City Council v. Murphey (Ga.) 3 S. E. 326; Becroft v. City of Council Bluffs, 63 Iowa, 646, 19 N. W. 807. Nevertheless, when express power is given, substantial compliance with the statute is all that is required. McNamara v. Estes, 22 Iowa, 246. In the further discussion of the proposition regard must be had of the essential difference between a tax levied for governmental purposes and a special assessment founded on the theory of benefits conferred. Illinois Cent. R. Co. v. City of Decatur, 13 S. C. 293; Town of Macon v. Patty, 57 Miss. 378; City of Fairfield v. Ratcliff, 20 Iowa, 396. The foundation of the power to levy special assessments is, no doubt, the general taxing power of the state, and not the police power, or the right of eminent domain. Warren v. Henly, 31 Iowa, 31; Motz v. City of Detroit, 18 Mich. 494; Allen v. Drew, 44 Vt. 174; Keith v. Binhgam, 100 Mo. 300, 13 S. W. 683; In re Centre St. (Pa. Sup.) 8 Atl. 56. But the whole theory of a special assessment is based on the doctrine that the property against which it is levied derives some special benefit from the improvement. Rich. v. City of Chicago (Ill. Sup.) 38 N. E. 255, and cases cited in Judge Elliott's work on Railroads (volume 2, p. 1100).

Same—Same—Railroad Right of Way—Statutes.

With these elementary propositions settled, we now turn to our statute, and find that at the time the assessment was levied it authorized cities to pave and curb any highway or alley therein, and to levy a special tax on the "lots and parcels of land fronting on the highway" to pay the expense of such improvement. Code 1873, § 466. See, also, Acts 23d Gen. Assem. c. 14, §§ 10, 11, and Acts 25th Gen. Assem. c. 7. The ordinance passed by the defendant city in virtue of the power thus conferred, so far as material, reads as follows: "The proportion

of the cost chargeable to the property owners for such improvements shall be ascertained and assessed by the city council against each owner and lot or parcel of land abutting, fronting upon, or adjacent to said improvement in proportion to the number of front feet. The city engineer shall also report to the council the number of front feet fronting on, or abutting on, or adjacent to such improvement, together with the names of the owners, and the number of front feet owned by each as nearly as can be ascertained, and the amount chargeable to each separate lot or parcel of ground." This was the power conferred by the legislature, and made effective by ordinance; and it was to charge the expense against each owner, and lot or parcel of land abutting on the improvement, with the cost thereof. Is a railroad right of way acquired by condemnation proceedings either a lot or parcel of land subject to assessment? Appellees rely on City of Muscatine v. Chicago, R. I. & P. Ry. Co., 79 Iowa, 645, 44 N. W. 909, as supporting the affirmative of the proposition; while appellants with equal confidence rely on the same case reported in 88 Iowa, 291, 55 N. W. 100, when it was before this court on a second appeal. The exact question does not seem to have been raised when the case was first before the court. From the statement of facts in the fourth division of the opinion it appears that the railroad company acquired title to the lots and lands occupied by it through a grant from the city, and by purchase; that it had absolute title to a large part of the property, and an easement in the remainder; and that the land was occupied with defendant's railroad track, station houses, turntables, and other improvements. A part of the land had at one time been a public street, but the public had ceased to use it, and right of occupancy was conferred by the city on the defendant railway. The court, through Beck, J., said: "The defendant, the perpetual possessor of the land, is the owner who must respond to all demands made in the exercise of the authority of taxation;" citing some cases. When the case was before us the second time, the court said, speaking through Robinson, J.: "That portion of the paving is adjacent to the land concerning which it was held on the former appeal that assessments on account thereof should be paid by defendant," referring to certain property owned by defendant, and used as before stated. The writer of the opinion further emphasizes this thought in the first division of the second opinion. In the third division of that opinion the writer further said: "$1,746.30 is for paving west of that in front of its property already considered. * * * That portion of the paving to which we now refer was done adjacent to land over which defendant had the right to lay its track, but to which it did not have title. * * * The charter of plaintiff authorized it to require the owner of lots adjacent to a street to pave it, and not the owner of a mere easement in the lots. The general statute is to the same effect,"—citing Koons v. Lucas, 52 Iowa, 181,

3 N. W. 84. It is apparent that the original case did not decide the point now under consideration, for, if it had, it would have been the law of the case, whether right or wrong, and would have been followed on the second appeal. That the court did not consider the question involved on the first appeal is clear, for in the first division of the second opinion the decision on the first appeal with reference to the property involved therein was held res adjudicata, and to be followed on the second appeal. It must be admitted that Koons v. Lucas, 52 Iowa, 181, 3 N. W. 84, cited in support of the second opinion, does not directly sustain it. In that case the railway tracks were laid on the street, and not on a right of way adjacent thereto; but the rule of construction established on the second appeal of the City of Muscatine Case seems to have some support in the Koons Case. Of the cases cited in support of the principle announced in the first opinion, Cummins v. Railroad Co., 63 Iowa, 397, 19 N. W. 268, and Hollingsworth v. Railroad Co., 63 Iowa, 443, 19 N. W. 325, merely hold that in estimating damages in condemnation proceedings the jury might properly treat the case as if the owner was devested of all his interest in the land, for the reason that the easement created thereby would be presumed to be perpetual. In both cases it is said that the owner retained the fee, and that under certain circumstances it would revert to plaintiff or his grantee. Surely, these cases do not count for much in favor of either party to this contention. In the other case—Railroad Co. v. Spearman, 12 Iowa, 112—the railroad company owned certain depot grounds in the city of Mt. Pleasant that were about to be sold to satisfy a tax levied by the city for the purpose of constructing a sidewalk adjoining said property. It acquired its title from the patent owners for depot purposes, and the property was used for that purpose at the time the tax was levied. This property was held liable for the tax under then existing laws which made "all property in the state belonging to any bank or company subject to taxation." By section 15 of the Acts of 1856 the defendant city was given the right to levy taxes on all taxable property within its boundaries, and by section 16 of the same act it was authorized to build sidewalks, and assess the expense on the owners of contiguous lots, "which shall have the effect of a special tax levied on their property." This decision is manifestly in accord with both opinions in the City of Muscatine Case, and it is not an authority for either of the parties to this appeal. There the railroad company was the owner of the lots by purchase, as in the City of Muscatine Case, and the assessment was held properly levied.

From this view of our cases it would seem to follow that the last opinion in the City of Muscatine Case is the only one that is really decisive of the question now under consideration. That expressly holds that it is the owner of the lots or lands adjacent to the street who is subject to the tax, and not the owner of a

mere easement in or over the property. Following the general rules heretofore announced, it is difficult to arrive at any other conclusion. The statute must receive a strict construction, and, unless it authorizes the levy of an assessment on mere easements, the right does not exist. The owner of the lots still has the fee title. He has been deprived of the use of 50 feet off the end thereof, in virtue of the condemnation proceedings, but this use may terminate at any time by nonuser or abandonment. A mere easement is "neither a lot nor a parcel of land." The statute provides that "words and phrases are to be construed according to the context and the approved usage of the language." Section 45, par. 2, Code 1873. It will hardly be claimed that, according to the approved usage of language, the owner of an easement is the owner of a lot or parcel of land. We do not overlook the decisions heretofore cited holding that the easement is presumed to be permanent and perpetual, and that the landowner has, as a rule, little of value in the land condemned; but no case in this state has ever held that a railway by condemnation proceedings acquired ownership of the land itself. For the purpose of assessing damages it has been so treated in some cases, but for no other purpose (save general taxation), as we understand it. We may well assume that the legislature, in passing the acts in question, did not intend that railways' rights of way should be assessed for paving and curbing, for the reason that such rights, used solely for the laying of tracks, would not, as a general rule, be benefited in any manner whatever by the paving or curbing; and, if any argument were needed to enforce this thought, it is to be found in the facts of this case, which show that it was of no benefit whatever to the right of way. A different question arises where the property is used for depot grounds and other like purposes. On that point we express no opinion, for it does not arise in the instant case. The new Code, as we understand it, authorizes assessments against rights of way or easements of railway companies (see section 968); at least special charter cities are authorized to make such assessments. Appellees contend, however, that the latter part of section 12 of chapter 7 of the Acts of the 25th General Assembly authorizes the levy of the assessment. It reads as follows: "An assessment against any railroad or street railway for the paving of any street shall be a first and paramount lien upon the entire track of said railroad or street railway in the limits of the city making such assessments." That manifestly has reference to railroads and street railways on and over the streets. See sections 10 and 11 of the same act. They are too long to be set out at length, and we need only say that they authorize an assessment of a certain part of the expense of paving to street railways or railroads "upon the streets" ordered paved. They also rely on section 809 of the Code of 1873, found in the chapter relating to general revenues of the

state. It reads as follows: "No real estate used by railway corporations for roadbeds shall be included in the assessment to individuals nor the adjacent property, but all such real estate shall be deemed to be the property of such companies for the purpose of taxation. Nor shall real estate occupied for and used as a public highway be assessed and taxed as a part of the adjacent lands whence the same was taken for such public purpose." Found in the chapter relating to taxation for governmental purposes, it affords little or no light on the question before us. Indeed, it is almost universally held that general power to levy taxes for municipal purposes is not broad enough to confer the right to levy special assessments for local improvements. Oil Co. v. Palmer, 20 Minn. 468 (Gil. 424); Green v. Ward, 82 Va. 324; City of Fairfield v. Ratcliff, 20 Iowa, 396. Moreover, there is nothing in the section quoted that confers power on a municipality to levy special assessments on such property as is involved in this litigation. The distinction between taxation and the power to levy special assessments already pointed out is important when we consider the effect to be given the statute relied upon. In our opinion, it has no bearing on the proposition before us, except it be as an aid in the construction of the statute and ordinance under consideration. That statute uses the words "owner of lot or lots or parcels of land," and there is nothing to show that a mere easement was intended. The second opinion in the City of Muscatine Case seems to be decisive of the main point. Authorities from other states are conflicting. Wisconsin, Michigan, Pennsylvania, Missouri, and Connecticut seem to hold that a railroad right of way cannot be assessed for local improvements. Various reasons are given for these holdings, and the leading case in support of the conclusion is City of Philadelphia v. Philadelphia R. Co., 33 Pa. St. 41. See, also, City of Bridgeport v. New Haven R. Co., 36 Conn. 255. On the other hand, the supreme courts of Kentucky, New Jersey, Illinois, Ohio, California, and Indiana hold that under the statutes of their respective states such right of way is assessable for local improvements. Railroad Co. v. Connolly, 10 Ohio St. 159, seems to be the leading case on this side of the proposition. See, also, Illinois Cent. R. Co. v. City of Decatur, 126 Ill. 92, 18 N. E. 315, 1 L. R. A. 613. We will not take the time nor space needed to review these authorities. Some of them are based on the peculiar language of the statutes construed, while others proceed on the broad ground that such rights are subject to special assessments. Reconciliation of the cases is utterly impossible, and we content ourselves with arraying the states on either side of the question. There is a valuable note to Chicago, M. & St. P. R. Co. v. City of Milwaukee (Wis.) 28 L. R. A. 249 (s. c. 62 N. W. 417), to which reference is made. It ought to be said generally, however, that in New Jersey a showing

of special benefits must be made, even under a statute authorizing the assessment (see State v. City of Elizabeth, 37 N. J. Law, 330); and in Indiana the question is left somewhat in doubt by Louisville Ry. Co. v. State, 122 Ind. 443, 24 N. E. 350. Nearly all the cases hold that property of a railroad company used for warehouses, depots, and other like purposes is assessable for local improvements; the reason for this being that such property is benefited by the improvement, while the right of way occupied simply by the tracks of the company can receive no benefit from the improvement. It need only be added that the evidence in this case indisputably shows that the right of way received no benefit from the paving and curbing of the street. The question of the right to sell a fragment of the right of way, with its ties and tracks, is one of much difficulty, and it is differently answered by the courts of the country. A majority in point of numbers hold that it cannot be done, and for that reason that the lien of an assessment thereon is invalid. See Railroad Co. v. Doe, 114 U. S. 350, 5 Sup. Ct. 869, 29 L. Ed. 136; Gue v. Water Co., 24 How. 257, 16 L. Ed. 635; Chicago, M. &. St. P. Ry. Co. v. City of Milwaukee (Wis.) 62 N. W. 417, 28 L. R. A. 249; People v. Gilon, 126 N. Y. 147, 27 N. E. 409. But see, also, City of Ludlow v. Trustees of Cincinnati S. R. Co., 78 Ky. 357, and Railroad Co. v. Connolly, supra. Holding, as we do, that the statute does not confer the power of assessment on the municipality, we need not pronounce definitely on this point.

2. Further, it is said that the statutes and ordinances under consideration are unconstitutional and void, because of the arbitrary assessment per front foot, and not according to benefits. That question does not seem to have been raised by the pleadings, or presented to the lower court, and we will not consider it.

Appeal—Review.

3. Again, it is said that no benefits resulted to the right of way, or to the corporation owning or occupying the same, and that for this reason the assessment was invalid. If that were the only question in the case, we would be inclined to hold with appellants' contention that, as there was no benefit whatsoever, the assessment was, for that reason alone, invalid. There are, of course, some objections to this conclusion, and it is best, perhaps, that we express no decided conviction on the subject, for it seems to be held by the courts of high authority that the legislature has power to authorize the assessment of railway rights of way for local improvements. In re County Com'rs of Hampshire Co., 143 Mass. 424, 9 N. E. 756. That question is also left open for further consideration when it properly arises.

Whether Railroad Right of Way Assessable for Local Improvements—Query.

4. The Rock Island Company was simply a lessee of the property of the Keokuk & Des Moines Railroad, yet a personal

judgment was entered against it, and it was the only party notified of the assessment. By the terms of its lease the Rock Island Company agreed to pay all taxes and assessments of value made on the property, and because of this it was held personally liable to the contractor for the assessment. This holding is complained of. Is the promise made in the lease such a one as the city or the contractors may enforce? That interrogatory seems to be answered in the negative by German State Bank v. Northwestern Water & Light Co., 104 Iowa, 717, 74 N. W. 685, Davis v. Waterworks Co., 54 Iowa, 59, 6 N. W. 126, and Messenger v. Votaw, 75 Iowa, 225, 39 N. W. 280. At the time the promise was made there was no indebtedness from the Des Moines Company to any one. The contract was solely for the benefit of the Des Moines Company, and there was no privity between the city or the contractor and the Rock Island Company. As said in the German State Bank Case, "The principle that one may sue upon a promise made to another for his benefit is, therefore, confined to cases where the person for whose benefit the promise is made has the sole exclusive interest in its performance." Had the assessment been lawful, the court was not authorized to render judgment against the Rock Island Company.

Right to Sue—Absence of Privity.

5. Further, it is contended that, as no notice was given the Des Moines Company, the assessment was invalid. The notice properly described the property, and was directed to the Rock Island Company. No doubt this was because general taxes had been paid by that company. As we understand it, there was nothing more than a mistake in name. The statute under which the assessment was made says that "a mistake in the name of the owner shall not vitiate the lien," and that the plat must show the names (so far as practicable) of the several owners. Sections 478 and 479 of the Code of 1873 also provided, in substance, that the municipality, or the person to whom it has directed payment to be made, is entitled to recover if the trial court is satisfied that the work has been done or material furnished, which, according to the true intent of the act, would be chargeable upon the lot or land through or by which the street, alley, or highway improved passed, to the extent of the proper proportion of the value of the work or materials which would be chargeable on such lot or land, notwithstanding any informalities, irregularities, or defect in such municipal corporation or any of its officers. Kendig v. Knight, 60 Iowa, 33, 14 N. W. 78; Amery v. City of Keokuk, 72 Iowa, 704, 30 N. W. 780; Tuttle v. Polk, 92 Iowa, 447, 60 N. W. 733; and Dittoe v. City of Davenport, 74 Iowa, 66, 36 N. W. 895,—seem to sustain appellees' contention on this point. This is not a reassessment, as contended by appellants.

Local Assessments—Validity—Notice.

6. The other points argued need not be considered, as they

are not important. There should be a decree enjoining the collection of the tax from the railroad companies, and the cause will be remanded for that purpose. Reversed.

Waterman, J. (dissenting). The rule that the owner of the fee is liable for a special assessment levied against an abutting railway right of way across his land is so inequitable that I cannot conceive such a result to have been intended by the general assembly. It puts the burden of paying for the improvement on one who has no beneficial interest in the real estate, leaving the present possessor, whose right in the property is practically perpetual, exempt from any liability therefor. Section 1344, Code 1897, which is but a re-enactment of a previous statute, provides: "No real estate used by railway corporations for roadbeds shall be included in the assessment to individuals of the adjacent property, but all such real estate shall be the property of the companies, for the purpose of taxation." While this section is found in the chapter relating to ordinary taxes, it announces, as a general principle, that railways are the owners of the land in their rights of way for purposes of taxation. Although the general power to levy taxes does not confer the right to impose special assessments for local improvements, yet a general definition of who shall be deemed the owner of a certain kind of property for purposes of taxation applies to all kinds of taxes. We must look further to find the authority to levy this assessment. We start, then, with the principle established that the right of way is to be treated as land, and the railway company is deemed its owner; and we next find that the city had authority, as stated by the majority, to levy the cost of this improvement on "the lots and lands fronting on the highway." This power was made effective by the ordinance set out in the foregoing opinion. In the case of City of Muscatine v. Chicago, R. I. & P. Ry. Co., 79 Iowa, 645, 44 N. W. 909,—being the first appeal of that case,—the facts as stated show that the railway company had a right of way only over a portion of the property sought to be assessed. The company resisted payment of the tax in part on the ground set up in the case at bar, viz. that it was not the owner of the land. On this issue this court said: "If any one held title to the land upon which defendant acquired the easement, it was valueless, for defendant had the right of the perpetual possession and enjoyment of the land. It would be absurd to say that the owner of such title is subject to taxation of any character upon the land, and that the owner of the perpetual possession is not. The spirit of our laws will not permit such a thing. The defendant, the perpetual possessor of the land, is the owner, who must respond to all demands made in the exercise of the authority of taxation. * * * As the defendant in this case was in the occupancy of the land with right of perpetual possession, it is to be regarded as the owner, and liable for the taxes

thereof." This holding does not seem to have been specially rested upon the statute we have set out, but is announced as a general principle of law, and in support of it the court cites Railroad Co. v. Spearman, 12 Iowa, 112; Cummins v. Railroad Co., 63 Iowa, 398, 19 N. W. 268; Hollingsworth v. Railway Co., 63 Iowa, 443, 19 N. W. 325. On the second appeal no attempt was, or properly could have been, made to question this doctrine. It was the same case in every respect, a second time before the court, and, right or wrong, the first opinion announced the law which governed it. Drake v. Railway Co., 70 Iowa, 59, 29 N. W. 804, and cases cited. But I cannot think the rule a wrong one, and I do not understand the majority to overrule the first case. I may say further that I am unable to comprehend the distinction made on this second appeal between that part of the right of way of which it is said the railway was the owner (that is, to which it had obtained deeds) and that part in which it is spoken of as having only an easement (that is, which it has condemned). A deed to a railway company of land for a right of way ordinarily conveys only an easement. Brown v. Young, 69 Iowa, 625, 29 N. W. 941; Elliott, R. R. § 972. What the railway company in that case held by condemnation, and what it obtained by deed for its right of way, should have been treated alike. All should have been exempt, or all liable. But the opinion holds the company liable on the deeded lands, and exempts it on those condemned. Outside our own state there is ample authority for holding that a railroad right of way is assessable for improvements of this kind. Chicago & N. W. R. Co. v. Village of Elmhurst (Ill. Sup.) 46 N. E. 437; Elliott, R. R. § 786; Illinois Cent. R. Co. v. City of Decatur, 126 Ill. 92, 18 N. E. 315, 1 L. R. A. 613 (this case was affirmed on appeal to the supreme court of the United States, 147 U. S. 190, 13 Sup. Ct. 293, 37 L. Ed. 132); Chicago & A. R. Co. v. City of Joliet, 153 Ill. 649, 39 N. E. 1077; Railway Co. v. Connolly, 10 Ohio St. 164; New York, L. E. & W. R. Co. v. Marion Co. Com'rs (Ohio Sup.) 27 N. E. 548; Railway Co. v. Hanna, 68 Ind. 562; Paterson & H. R. Co. v. City of Passaic, 54 N. J. Law, 340, 23 Atl. 945; New Haven v. Fair Haven & W. R. Co., 38 Conn. 422; Atchison, T. & S. F. R. Co. v. Peterson (Kan. Sup.) 51 Pac. 290; Appeal of North Branch Ry. Co., 32 Cal. 499; City of Ludlow v. Trustees of Cincinnati S. R. Co., 78 Ky. 357; London & N. W. Ry. Co. v. Vestry of Parish of St. Pancras, 17 Law T. (N. S.) 654. These cases perhaps sufficiently answer the argument of the majority that a right of way is not land, within the meaning of the statute, and that the railway company derived no benefit from the improvement. In the case against Connolly, supra, it is said: "The company, to advance its own interests, has seen fit to appropriate to its own use grounds within the corporate limits of the city of Toledo, and over which the city had the power of making as-

sessments to defray the expense of local improvements; and why should not the company be held to have taken it cum onere? A citizen would hardly claim exemption because he had devoted his lot to uses which the improvements could not in any way advance, and we see no good reason why a railroad company should be permitted to do so." To escape the result of this reasoning, the majority holds that the fee owner, who has been deprived of possession, control, and all beneficial interest, is liable to defray the expense of the improvement; and it may well be asked, how is he, or how can he be, benefited? Furthermore, I may say the question of benefits was in issue in the trial court, and the fact was found against plaintiff. There is no ground shown for our interference with that finding. So, too, I may add that the authorities generally hold that the land upon which a railway depot is located is benefited by the improvement of an adjacent street. See, for instance, Elliott, R. R. § 785; City of Muscatine v. Chicago, R. I. & P. Ry. Co., 88 Iowa, 291, 55 N. W. 100. Now, a depot is only useful because of the right of way. Any benefit to defendants' depot property necessarily would affect the value of the right of way. There are many cases to be found holding that the right of way of a railway company is not subject to assessments for street improvements. But in determining this conflict we must take into consideration the statutory provision quoted (section 1344, Code). Aside from this, however, we should be influenced by the demands of manifest justice, rather than by a count of cases. That the right to impose such a tax is just seems to me apparent without argument. The burden borne by other citizens should, under similar circumstances, be shared by the railway companies. I do not accord any weight to the matter of what may be called legislative construction, as embodied in section 968, Code 1897, which authorizes cities under special charters to assess rights of way of railways for street improvements. This but expresses in terms the law that before existed by implication, for the city of Muscatine was under a special charter when the cause of action arose which was involved in the two appeals to which reference has been made. How the lien given the city in this case is to be enforced, I need not inquire. If the right of way cannot be sold, payment may be secured out of other property of the debtors. Railway Co. v. Boney, 117 Ind. 501, 20 N. E. 432; Same v. State, 122 Ind. 443, 24 N. E. 350.

2. With reference to the personal judgment against plaintiff the majority holds the trial court was without authority to render it, and the case of German State Bank v. Northwestern Water & Light Co., 104 Iowa, 717, 74 N. W. 685, together with two other cases from this court, are relied upon to sustain the position. The German State Bank Case was quite different in its facts from the one at bar. There one person promised another, to whom he had sold stock in a corporation, to pro-

tect the stock in the purchaser's hands against debts owed by the corporation to third parties. In the case of Davis v. Waterworks Co. (Iowa) 6 N. W. 126, also cited, the third person, while benefited by the promise, had no direct interest in it. This is an important distinction. See 7 Am. & Eng. Enc. Law, 107. In the third case—Messenger v. Votaw—there was a sale of real estate subject to a mortgage upon which the grantee agreed to pay interest, he having received money therefor. The right of the creditor to sue on the agreement, while spoken of, was not in the case. It could not have been meant to hold that a purchaser of mortgaged premises, who agrees with the mortgagor to pay the mortgage debt, is not liable to the mortgage creditor on the promise. The converse of the proposition is elementary, and sustained by so many decisions of this court that I refer to the digest for a citation of cases. In the case at bar the agreement was a part of the contract of lease, and the payment of taxes and assessments was in the nature of rent. I think the case comes clearly within the doctrine announced in the following cases heretofore decided by this court: Johnson v. Collins, 14 Iowa, 63; Same v. Knapp, 36 Iowa, 616; Rice v. Savery, 22 Iowa, 470; Gooden v. Rayl, 85 Iowa, 592, 52 N. W. 193. The facts involved make this case much akin to those referred to, in which the purchaser of mortgaged real estate assumes and agrees to pay off the incumbrance. The lessor in the present case would have had no right of action under this promise as against plaintiff without first paying the assessment, and then his right would have been only to sue for money paid to plaintiff's use. Cassady v. Hammer, 62 Iowa, 359, 17 N. W. 588. This being true, the municipality levying the tax or assessment had the sole direct interest in the performance of the promise. I do not wish to be understood as saying that in very case of a promise made for the benefit of a third person the latter will have a right of action thereon. But, where a fund is given the promisor, and in consideration thereof he promises to pay out of it some obligation, present or future, of the promisee to a third person, such third person may sue thereon as being directly interested therein. Out of the multiplicity of conflicting cases on this subject I shall content myself with citing but one other in support of the proposition last stated: Washburn v. Investment Co. (Or.) 38 Pac. 620. The conclusion I reach is that the judgment of the trial court should be affirmed.

Ladd, J., concurs in this dissent. Granger, C. J., not sitting.

PEOPLE *ex rel.* CONLON

v.

MOUNT, MAYOR OF JOLIET.

(*Supreme Court of Illinois, Oct. 19, 1900.*)

Ordinances—Validity—Effect of Non-Compliance with Charter Requirements.—The charter of a city bears the same general relation to the ordinances of a city that the constitution of a state bears to its statutes, and therefore a city ordinance which does not comply with the city charter is as invalid as a statute which does not conform to the requirements of the state constitution.

Municipal Corporations—Whether Power to License Exercisable by Resolution.—The general rule is that the power of a municipal corporation to license can only be exercised by ordinance, and not by resolution.

Same—Licenses—Whether Omission to Fix Fees Can Be Supplied by Resolution.—The charter of the city coupled the power of the city council to license the selling of intoxicating liquor with the power to determine the amount to be paid for such license. And, by the same section of the charter, such power to license, and the power to determine the amount to be paid for the license, were also coupled with the requirement that the license should not extend beyond the municipal year in which it was granted. *Held*, that when such power to license was exercised by the passage of an ordinance, the determination of the amount to be paid for the license had to be, at the same time, embodied in the ordinance, and that the effect of a failure to do this could not be remedied by a mere resolution or motion of the city council.

Same—Same—Same.—Where the power to grant licenses to sell intoxicating liquor and to fix the amount to be paid therefor is vested in the city council, and the mayor is made by express statutory provision a part of the council with authority to prevent the passage of an ordinance by less than a two-thirds vote, but without any authority in regard to resolutions of the council, the council, even in the absence of an express inhibition of the charter or a statute, cannot legally fix the fees for such licenses by mere resolutions.

Ordinances—Repeal.—A municipal ordinance cannot be amended, repealed, or suspended by a resolution of the city council.

Same—Same.—The contention that the ordinance in question was repealed by chapter 33 of the general revision of the ordinances of the city passed in 1889 was not sustainable, as the invalid part of such chapter could not operate as a repeal of the ordinance, and the section of such revision providing that all ordinances of the city theretofore passed "in relation to the subject-matter of or inconsistent with any of the provisions of the following chapters * * * * be and the same are hereby severally repealed" was not applicable.

People *v.* Mount, Mayor of Joliet

Appeal by relator from Second district appellate court. Affirmed.

Case Stated.

This is a petition filed on July 7, 1899, by the people, upon the relation of William Conlon, for a writ of mandamus to compel appellee, as mayor of the city of Joliet, to sign a dramshop license. The respondent filed his answer, setting forth the reasons why he refused to sign said license. Issues were joined, and a jury was waived. The court, having heard the proofs, found for the respondent, and denied the writ, and rendered judgment against the relator for the costs. An appeal was taken from the judgment of the circuit court to the appellate court, and the judgment of the circuit court was affirmed by the latter court. The present appeal is prosecuted from such judgment of affirmance.

The petition for mandamus recites that the city of Joliet is incorporated under the general laws of the state, and authorized by its charter to license and regulate the sale of intoxicating liquors; that before filing the petition the city had adopted an ordinance in regard to the sale of intoxicating liquors, providing therein that licenses should be granted to applicants upon their complying with certain specified requirements, and "paying for such license for the use of said city at a rate that may be from time to time established per annum"; that since July 1, 1892, and before the beginning of each municipal and fiscal year, the city council has regularly established the dramshop license fee for each of said years, as provided by said ordinance; that on June 26, 1899, the city fixed by resolution said license fee for the year commencing July 1, 1899, and ending June 30, 1900, at the sum of $500; that on June 27, 1899, the relator petitioned the city council to grant him a license to keep a dramshop for the municipal and fiscal year beginning July 1, 1899, and filed with the city clerk two dramshop bonds, conditioned as required by the ordinance of the city and the laws of the state, which bonds were approved by the city council; that on July 1, 1899, relator paid to the city treasurer the sum of $500 as a license fee, taking the treasurer's receipt therefor; that he presented this receipt to the city clerk, and made demand upon him for a dramshop license; that the clerk thereupon prepared and countersigned a license in the form prescribed in the ordinance, authorizing the relator to conduct a dramshop from July 1, 1899, to July 1, 1900; that relator presented said license and receipt to the appellee, and requested him, as mayor, to sign said license, but that appellee (the respondent below) refused to sign the same; that by the ordinances of the city no license shall be granted for a longer period than one year, and all licenses shall be signed by the mayor and countersigned by the city clerk under the corporate seal; that it was the duty of the appellee to sign said license; and that his refusal so to do was unlawful and illegal. The answer of the appellee based his refusal to sign the license

upon the grounds that the city council was not authorized and empowered to fix or establish the license fee to be paid by dramshop keepers for the municipal and fiscal year beginning July 1, 1899, by mere resolution or motion; that if the council could lawfully fix such license fee by resolution or motion, and did do so on June 26, 1899, then such resolution was a legislative act, and was subject to the veto of the mayor; that said resolution was subsequently vetoed by the appellee, as mayor, at the time and in the manner prescribed by the charter of the city, and was not passed over such veto, nor was any attempt made to pass it over such veto in the manner provided by law; that, at the time of the adoption of said resolution fixing the license fee at $500, there was in full force an ordinance, numbered 796, entitled "An ordinance concerning dramshop licenses," passed by the city council of the city of Joliet on the 27th day of June, A. D. 1889, and approved by the mayor of said city on the 28th day of June, A. D. 1889, which fixed the license fee at the sum of $1,000 per annum, payable in advance; that said Ordinance No. 796 has continued in force from the date of its approval, and is in full force and effect, and in no manner repealed, superseded, or otherwise vacated; and that relator's bond was not, and never had been, approved in the manner provided by section 5 of the dramshop act.

The facts, as shown by the pleadings and proofs in the case, are substantially as follows:

The city of Joliet is organized under the general incorporation act of 1872. It has seven wards and fourteen aldermen, two being elected from each ward. In 1884 the ordinances of the city were revised, and by chapter 25 of such revision the city council was authorized to grant a license to keep a dramshop to any person applying therefor in writing, upon such person complying with certain requirements therein set forth, "and paying for such license for the use of the said city at a rate that may be from time to time established per annum." On June 27, 1889, said Ordinance No. 796 was adopted, and on the next day approved by the then mayor of the city, and is as follows:

"An ordinance concerning dramshop licenses.

"Be it ordained by the city council of the city of Joliet:

"Section 1. That the dramshop license of said city is hereby fixed at $1,000.00 per annum payable in advance.

"Sec. 2. All ordinances and parts of ordinances in conflict herewith are hereby repealed."

In 1891 the ordinances of the city were again revised. Chapter 33 of the revision of 1891 was entitled, "Intoxicating Liquors;" and, among other things, it authorized the city council to grant a license to keep a dramshop to any person

applying therefor in writing, upon such person complying with certain conditions and requirements therein prescribed, "and paying for such license for the use of the said city at a rate that may be from time to time established per annum." The provision in regard to the payment of a license fee was the same as that in the revision of the ordinances made in 1884.

The revision of 1891 contained, also, the following section: "All ordinances of the city of Joliet heretofore passed in relation to the subject-matter of or inconsistent with any of the provisions of the following chapters [naming them, chapter 33 included] be and the same are hereby severally repealed." On June 27, 1892, the committee on licenses, to whom had been referred the several applications for dramshop licenses, made a report, which was adopted, and recommended that such applicants "be granted licenses and bonds approved upon their paying into the city treasury the sum of $1,000.00." On June 28, 1893, said committee made a report, which was adopted, recommending that licenses be issued to the applicants therein named on their "complying with the ordinance." On July 2, 1894, the following resolution was adopted: "Resolved, that the dramshop license for the fiscal year commencing July 1, 1894, is hereby fixed at $1,000.00, payable in advance." On June 27, 1895, said committee made a report, which was adopted, directing the mayor and city clerk to issue licenses to the applicants therefor therein named "upon payment into the city treasury of the license fee of $1,000.00 each." On June 29, 1896, a resolution was adopted by the council fixing the license fee at $1,000 per annum, payable in advance. On June 30, 1897, said committee made a report, which was adopted, authorizing and instructing the mayor and clerk to issue licenses to certain applicants upon their paying into the city treasury the license fee of $1,000. On June 27, 1898, the same committee made a similar report, which was adopted, recommending the issuance of licenses upon the payment into the city treasury of a license fee of $1,000. On June 26, 1899, the city council of Joliet, by a vote of eight yeas to six noes, adopted a resolution or motion that "dramshop licenses beginning July 1, 1899, be and the same are hereby fixed at $500.00, payable in advance." This last resolution or motion was duly vetoed by the mayor in a message presented to the city council at a subsequent meeting. No attempt was made to pass the resolution over the veto. The relator filed the bonds required by the ordinances and statutes with the city clerk, and these bonds were presented to the city council, and approved by a vote of eight yeas to six noes. On July 1, 1899, the relator deposited the sum of $500 with the city treasurer, and presented his receipt therefor to the city clerk, and procured from the city clerk a form of license, countersigned by him under the corporate seal, and presented the same to the appellee for signature, but the appellee refused to sign the license. Appellee also wrote to the city clerk and city treasurer notify-

ing them "not to accept from any person or persons a license fee of $500.00 for each dramshop, as fixed in said resolution."

Upon the hearing of the cause before the trial judge, certain propositions of law were submitted to the trial court by the relator herein to be held as law in the decision of the case. The refusal of these propositions, and exceptions made by the relator to such refusal, raise the questions which are discussed in the opinion.

Haley & O'Donnell, C. W. Brown, and Mark G. Harris, for appellant.

Richard J. Barr, Coll McNaughton, and George S. House, for appellee.

Magruder, J. (after stating the facts). 1. The first question presented for our consideration is whether the city of Joliet, whose charter is the general act providing for the incorporation of cities and villages, can fix and establish the license fee to be paid by venders of intoxicating liquors by mere resolution or motion, or whether the power to fix and establish such license fee, when exercised, must be exercised through and by an ordinance duly enacted. In order to determine this question, it will be necessary to examine some of the provisions of the charter of the city of Joliet embodied in the general incorporation act above referred to. By paragraph 4, § 1, art. 5, of the city and village act, "the city council in cities * * * shall have the following powers: * * * Fourth, to fix the amount, terms and manner of issuing and revoking licenses." By paragraph 46 of said section 1 the city council in cities is clothed with the power "to license, regulate and prohibit the selling or giving away of any intoxicating malt, vinous, mixed or fermented liquor, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license." The second proviso to paragraph 46 is as follows: "Provided further, that, in granting licenses, such corporate authorities shall comply with whatever general law of the state may be in force relative to the granting of licenses." Hurd's Rev. St. 1897, pp. 268, 270. By an act approved June 15, 1883, in relation to dramshops, it is provided in section 1 "that hereafter it shall not be lawful for the corporate authorities of any city, town or village in this state, to grant a license for the keeping of a dramshop, except upon the payment, in advance, into the treasury of the city, town or village granting the license, [of] such sum as may be determined by the respective authorities of such city, town or village, not less than at the rate of $500.00 per annum." Hurd's Rev. St. 1897, p. 699. Under its charter, the city of Joliet, in granting licenses after the passage of the act of 1883, was obliged to comply with the provisions of that act, which related to the granting of licenses. Chapter 33 of the Revised

Ordinances—Validity—Effect of Non-Compliance with Charter Requirements.

Ordinances of 1891 of the City of Joliet, entitled, "Intoxicating Liquors," provided that the person desiring the license might obtain it by complying with certain requirements, "and paying for such license for the use of the city at a rate that may be from time to time established per annum." Clearly, this ordinance of 1891 does not conform to the city charter, inasmuch as the above-quoted provision of the act of 1883 must be regarded as being written into the city charter, and as being a part of it. The act of 1883 requires the license fee to be paid in advance into the treasury of the city; but the ordinance of 1891 simply conditions the issuance of the license upon the payment of such license fee, without requiring the payment to be made in advance. The act of 1883 requires that there shall be paid in advance for the license such sum as may be determined by the respective authorities of the city, "not less than at the rate of $500.00 per annum"; but the ordinance of 1891 does not fix $500 as the minimum rate, but only provides for the payment at a rate that may be from time to time established. By the act of 1883 the municipal authorities are obliged to require a license fee of not less than $500 per annum. By the ordinance of 1891 the city authorities of Joliet are left free to fix the license fee at any amount, whether above or below $500 per annum. Section 46 of the charter of the city of Joliet provides that the license to be granted shall not extend beyond the municipal year in which it shall be granted; but, while it is true that the license to sell intoxicating liquor cannot be granted for a longer period than one year, yet there is nothing in the charter which requires the amount of the license fee to be fixed every year. The ordinance of 1891 seems, from its language, to provide that the rate to be paid for the license is to be from time to time established per annum; that is to say, that the amount of the license fee is to be fixed every year. Section 46, as above quoted, can bear no such interpretation.

It is clear from what has been said that the ordinance of 1891, standing by itself, does not comply with the general law of the state in regard to dramshop licenses, either in respect to the mode of payment, or the amount to be paid, or the time of fixing such amount. It is laid down in the authorities that the charter of a city bears the same general relation to the ordinances of a city that the constitution of a state bears to its statutes. 1 Dill. Mun. Corp. (4th Ed.) p. 385, § 308, and notes; Quinette v. City of St. Louis, 76 Mo. 402. Hence a city ordinance which does not comply with the city charter is as invalid as a statute which does not conform to the requirements of the state constitution. The charter of every municipal corporation, or the statute by which it is created, is its organic act; and the corporation cannot do any act not authorized by such charter, or by some legislative act applicable thereto. "All acts beyond the scope of the powers granted are void." 1 Dill. Mun. Corp. (4th Ed.) p. 146, § 89. Surely,

in not prescribing the amount to be paid as a license fee, the ordinance of 1891 is incomplete. But it is claimed by the appellant that the incompleteness and omissions of the ordinance of 1891 are made up and supplied by the resolution of June 26, 1899. This resolution or motion, which was adopted by a vote of eight yeas to six noes, is to the effect that "dramshop licenses beginning July 1, 1899, be and the same are hereby fixed at $500.00, payable in advance." The defects in the ordinance of 1891, as thus indicated, could not be remedied by the passage of the resolution of June, 1899. The general rule is that the power to license can only be exercised by ordinance, and not by resolution. Such power is a dormant one, and must be called into exercise by the passage of an ordinance duly enacted. The authorities abundantly sustain this position. 13 Am. & Eng. Enc. Law, 534; Bull v. City of Quincy, 9 Ill. App. 127; Bills v. City of Goshen, 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 261; People v. Village of Crotty, 93 Ill. 180; People v. Cregier, 138 Ill. 401, 28 N. E. 812. In the American & English Encyclopedia of Law (volume 13, p. 534) the rule is thus stated: "When a municipal corporation is duly authorized to exact licenses, the power can only be exercised by the passage of an ordinance specifying the details necessary to be pursued." Paragraph 46, § 1, art. 5, as above quoted, couples the power of the city council to license the selling of intoxicating liquor with the power to determine the amount to be paid for such license. By that section the power to license, and the power to determine the amount to be paid for the license, are also coupled with the requirement that the license shall not extend beyond the municipal year in which it is granted. It follows that, when the power to license the sale of intoxicating liquor is exercised by the passage of an ordinance, the determination of the amount to be paid for the license must at the same time be embodied in the ordinance. The amount was not embodied in the ordinance of 1891.

Municipal Corporations—Whether Power to License Exercisable by Resolution.

Same—Licenses—Whether Omission to Fix Fees Can Be Supplied by Resolution.

In People v. Village of Crotty, supra, which was a petition for mandamus against the village for the purpose of compelling it to issue licenses to the relator therein to keep a dramshop and pool table, reliance was placed upon certain resolutions or motions adopted at meetings of the board of trustees which fixed the amounts of such licenses for the municipal year; and in that case, after quoting paragraph 46 of section 1 of the city and village act, above referred to, we said (page 188): "It is clear, from the first of the above-cited provisions of the statute, that the legislature has given appellee the power to license, regulate, and prohibit the sale of intoxicating liquors. But the mere grant of this power by the legislature would not of itself authorize the village authorities to issue a license. This power to license, regulate, and prohibit is a dormant one, and affords no authority to issue licenses until called into

life and put in operation by appropriate legislation by the municipal authorities. Without the adoption of a general ordinance on the subject, authorizing the issuing of licenses, and specifying who shall issue them, the length of time they shall run, the amount to be paid by the applicant, the time and manner of payment, etc., the village authorities are powerless to issue license to any one." In the Village of Crotty Case the general ordinance on the subject, which authorizes the issuance of licenses, is not only required to specify who shall issue them, and the length of time they shall run, but also to specify the amount to be paid by the applicant, and the time and manner of payment. The ordinance of 1891, now under consideration, fails to meet the requirement thus laid down in the case last referred to. The case of People v. Village of Crotty, supra, was referred to and indorsed in the later case of People v. Cregier, supra, where we said (page 419, 138 Ill., and page 816, 28 N. E.): "Subdivision 96, § 1, art. 5, of the general law in relation to the incorporation of cities and villages, gives power to the city councils of cities and the president and board of trustees of villages to pass all ordinances, rules, and regulations proper or necessary to carry into effect the various powers granted by said section; and it is accordingly held that the power to license, regulate, and prohibit the sale of intoxicating liquors must be exercised by a city or village by means of an ordinance on that subject passed by the proper municipal authorities. The mere grant of this power does not of itself authorize the corporate authorities to issue licenses. The power is dormant until called into exercise by appropriate municipal legislation. People v. Village of Crotty, 93 Ill. 180." In the Cregier Case it was also said (page 421, 138 Ill., and page 817, 28 N. E.): "We would not be understood as holding that a board of trustees may, by resolution merely, license one, and refuse to license another having precisely the same qualifications and local surroundings; our view being that an ordinance must, in advance of the issuing of any license, prescribe the terms and conditions upon which licenses shall be granted, so that all in like situation, with like surroundings and having like qualifications, shall have equal opportunity to avail themselves of its privileges."

The power to license, including the power to fix the amount of the license fee, is a power which must be called into exercise by appropriate municipal legislation. A municipality can only legislate through the passage of ordinances, and not by the passage of mere resolutions. It is well settled that acts of legislation by a municipal corporation which prescribed a permanent rule of conduct or government, and which are to have a continuing force and effect, must be established by ordinance. Chicago & N. P. R. Co. v. City of Chicago, 174 Ill. 439, 51 N. E. 596; Village of Altamont v. Baltimore & O.

S. W. Ry. Co., 184 Ill. 47, 58 N. E. 340. "So matters upon which the council wishes to legislate must be put in the form of an ordinance, and all acts that are done in its ministerial capacity may be in the form of resolutions." 17 Am. & Eng. Enc. Law, 236. "Resolutions are special and temporary, applicable only to a single matter of passing moment. Ordinances are permanent regulations, applicable to all states of facts thereafter arising within the scope of their provisions." Horr & B. Mun. Ord. § 210a. Whether an act of legislation by a municipal corporation prescribes a permanent rule of conduct or government, and whether or not it is to have a continuing force and effect, depends upon the nature of the subject-matter legislated upon, and not upon the mere option of the city council. The subject of granting licenses to sell intoxicating liquor, and fixing the amount of the license fee therefor, is a subject which, in its nature, requires legislation of a permanent character, and of continuing force and effect. It does not follow, because the license to sell liquor can only extend for one year, that therefore the amount to be paid as a license fee must be changed annually or fixed anew every year. The amount of the fee should be fixed by an act of legislation, and remain, as fixed, for one year or ten years, or longer, until the legislative body passes a new measure changing the amount. One of the most important acts which a common council is called upon to perform is not merely the granting of licenses to sell intoxicating liquor, but the fixing of the amount to be paid for such licenses. The character of saloons where liquor is sold, and the character of the men who sell liquor in such saloons, will often be determined or affected by the amount of the license fee to be paid. The passage of the act of 1883, making $500 per annum the minimum fee for the issuance of such licenses, grew out of the prevailing idea that the character of the places where liquor is sold will be improved by increasing the amount of the license fee. Hence the matter of fixing the amount of the license fee is a matter which in no small degree concerns the public welfare. This being so, it would seem to follow necessarily that an enactment which fixes the amount of a license fee for the sale of intoxicating liquor should be embodied, not into resolution which is special and temporary, and applies only to a a single matter of passing moment, but in an ordinance which is a permanent regulation. An ordinance which fixes the amount of the fee is a regulation which applies to every state of facts thereafter arising within the scope of its provisions. Every man who desires a license to sell liquor will thereby be informed that there is a fixed amount which he must pay per annum, embodied in the highest form of municipal legislation; that is to say, an ordinance.

It is said, however, in behalf of the appellant, that section 1 of article 5 of the city and village act, which defines the

powers vested in the city council, nowhere requires the granting of licenses, or the fixing of the amount of license fees, to be embodied in ordinances, rather than in resolutions. The general rule is accordingly invoked that where a charter commits the decision of a matter to the city council, and is silent as to the mode, the decision may be evidenced by resolution, and need not necessarily be by an ordinance. It does not, however, necessarily follow that, because the charter does not in express terms require an act to be done by an ordinance, it must therefore be effected by a mere resolution. On the contrary, where the requirement that the municipal act should be done by ordinance is implied by necessary inference, a resolution is not sufficient, but an ordinance is necessary. Chicago & N. P. R. Co. v. City of Chicago, supra; Village of Altamont v. Baltimore & O. S. W. Ry. Co., supra; Board v. De Kay, 148 U. S. 599, 13 Sup. Ct. 706, 37 L. Ed. 573; 2 Dill. Mun. Corp. (4th Ed.) § 769, and notes; Newman v. City of Emporia, 32 Kan. 456, 4 Pac. 815. While the charter of the city of Joliet does not in express terms require the power to license to be embodied in an ordinance duly enacted, yet such requirement is clearly implied by necessary inference from the provisions of the charter.

Same—Same—Same.

The power to grant licenses to sell intoxicating liquor, and to fix the amount to be paid therefor, is a power which is vested in the city council in cities. Section 1 of article 3 of the city and village act provides that "the city council shall consist of the mayor and aldermen." Hurd's Rev. St. 1897, p. 263. The mayor is thus made by express statutory provision a part of the common council, and has a right to take part in the legislation passed by the common council. Section 18, art. 3, provides that "all ordinances passed by the city council shall, before they take effect, be deposited in the office of the city clerk; and if the mayor approves thereof, he shall sign the same, and such as he shall not approve he shall return to the council, with his objections thereto, in writing, at the next regular meeting of the council, occurring not less than five days after the passage thereof. * * * But in case the mayor shall fail to return any ordinance, with his objections thereto, by the time aforesaid, he shall be deemed to have approved such ordinance, and the same shall take effect accordingly." Section 19, art. 3, provides that, "upon the return of any ordinance by the mayor, the vote by which the same was passed shall be reconsidered by the council; and if, after such reconsideration, two-thirds of all the members elected to the city council shall agree, by yeas and nays, to pass the same, it shall go into effect, notwithstanding the mayor may refuse to approve thereof." It thus appears that the mayor has the veto power in reference to legislation passed by the common council, and that, where he exercises that veto power, such legislation cannot be effective unless it is passed by two-

thirds of all the members elected to the common council. The mayor is thus vested by law with the power, and has imposed upon him the duty, of supervising all legislative enactments by the city council. He is clothed with the duty of exercising a veto for the purpose of making this supervisory power effectual. This supervision by the mayor over municipal legislation was evidently intended by the legislature to operate as a check upon hasty and unwise legislation. Mere resolutions do not need to be submitted to the mayor for his approval. Horr & B. Mun. Ord. § 210; City of Burlington v. Dennison, 42 N. J. Law, 165. The wise and salutary provision of the statute which clothes the mayor with the veto power may be defeated by a city council by the simple election on its part to change the form of its legislative acts into resolutions, instead of embodying them in ordinances, if it be true that municipal legislation can be accomplished by mere resolutions. The case at bar furnishes an instance of the danger of allowing important municipal legislation to take the form of a resolution, in that it destroys the supervisory power of the mayor of the city. It is well said by the appellate court in their opinion delivered upon the decision of this case: "While, therefore, it requires eight votes to pass an ordinance of the city, and ten votes to pass it over a veto, a majority of a quorum or five members of the council can pass a resolution, and the mayor cannot interfere with it." It is therefore a fair matter of inference that the legislature intended the power to license, and fix the amount of license fees, to be exercised by the passage of ordinances, because otherwise the supervisory power of the mayor would be interfered with. Dillon, in his work on Municipal Corporations (volume 1 [4th Ed.] § 273), says: "Where the power to legislate for the corporation is vested in 'the mayor and councilmen,' the council by itself cannot legislate, but must act in conjunction with the mayor. In deciding the point the court observes: 'If a simple resolution [instead of an ordinance] would be sufficient, yet, before it would have any validity, it would necessarily have to be signed by the mayor, as a part of the lawmaking power. The coordinate action of both is required.'" Saxton v. Beach, 50 Mo. 488; Saxton v. City of St. Joseph, 60 Mo. 153; 1 Dill. Mun. Corp. (4th Ed.) § 271. "Where the charter vests the affairs of a city in the hands of the mayor and councilmen, the city council has no power except to act in conjunction with the mayor." 15 Am. & Eng. Enc. Law, 1032; 1 Dill. Mun. Corp. (4th Ed.) §§ 309, 246.

Paragraph 48, § 1, art. 5, defining the powers of the city council, provides that the city councils in cities shall have the power "to forbid and punish the selling or giving away of any intoxicating" liquor to any minor, etc. Section 2 of the act of March 30, 1874, in relation to dramshops, provides that "whoever, not having a license to keep a dramshop, shall, by himself or another, * * * sell any intoxicating liquor in

any less quantity than one gallon, or in any quantity to be drank upon the premises, or in or upon any adjacent room, building, yard, premises or place of public resort, shall be fined not less than $20.00 nor more than $100.00, or imprisoned in the county jail not less than ten nor more than thirty days, or both in the discretion of the court." Hurd's Rev. St. 1897, p. 699. Section 436 of chapter 33 of the Revised Ordinances of 1891 of the City of Joliet provides that no person, except regularly licensed dramshop keepers, etc., shall sell or give away any intoxicating liquors in any quantity whatsoever, and further provides that any person violating any of the provisions of the section shall, on conviction, forfeit and pay not less than $25 nor more than $100, or be imprisoned in the Bridewell for a term not exceeding sixty days at hard labor, or both, as the court may order. Section 439 of said Revised Ordinances of 1891 also provides that any licensed person who shall sell liquor to a minor, and shall be convicted of doing so, shall be fined for the offense. It is idle to suppose that the legislature intended a power, the necessary exercise of which involves the imposition of penalties and punishment, should be called into operation by the passage of a mere resolution. The power to license the vending of intoxicating liquors is in the nature of a police regulation; and paragraph 66, § 1, art. 5, as well as the spirit and tenor of all the other paragraphs of that section, indicates that police regulations must be embodied in ordinances. Section 3, art. 5, provides for the publication in a certain way of all ordinances imposing any fine, penalty, imprisonment, or forfeiture; section 4 makes provision for the manner of providing ordinances; sections 5 and 7 provide for the manner in which actions shall be brought by the city for the recovery of fines and the enforcement of penalties under ordinances; while by section 6 it is provided that "all moneys collected for licenses shall be paid into the treasury of the corporation at such times and in such manner as may be prescribed by ordinance." There are no provisions in the sections thus defining the powers of the city council which require the same things to be done under resolutions. In People v. Cregier, supra, we said (page 418, 138 Ill., page 816, 28 N. E.): "The tendency of the liquor traffic is so completely shown by all human experience that from an early day said traffic has been subjected in this state to the surveillance and control of the police power; and we presume such has been the case in most, if not all, civilized communities." The granting of licenses and the fixing of the amount of license fees is an essential part of the surveillance and control to which the liquor traffic is subjected in this state. If that control is exercised as a part of the police power of a municipality, it is absurd to attribute to the legislature the intention that measures relating to it should be put in the form of mere temporary resolutions. The first proviso to paragraph 46, § 1, art. 5, provides that the city council in cities "may grant

permits to druggists for the sale of liquors for medicinal, mechanical, sacramental and chemical purposes only, subject to forfeiture, and under such restrictions and regulations as may be provided by ordinance." It is here required that the restrictions and regulations under which druggists are permitted to sell liquors for the purposes mentioned must be provided by ordinance. One of the restrictions and regulations under which dramshop keepers are authorized to sell liquor is that they shall pay a sum as a license fee, not less than at the rate of $500 per annum. There is no reason why the restrictions and regulations under which druggists are placed in relation to this matter should be embodied in an ordinance, and the restrictions and regulations under which ordinary dramshop keepers are placed should not be embodied in an ordinance, or should take the form of a mere resolution. The very fact that the restrictions and regulations to be imposed on druggists must be provided for by ordinance indicates the intention of the legislature to have been that all restrictions and regulations under which the sale of liquor was to be permitted should be provided for by ordinance. Many of the cases referred to by counsel for appellant which hold that the amount of the license fee can be fixed by a resolution are cases arising in states and under laws where resolutions passed by common councils are so far regarded as having the force of ordinances that the mayor of the city can exercise his veto power in reference to such resolutions. Where resolutions are so far regarded in the nature of ordinances that they are subject to the veto power, it may well be held that the exercise of the power to license may be embodied in a resolution as well as in an ordinance. Such a case is the case of Municipality v. Cutting, 4 La. Ann. 336. But here it is conceded that a mere resolution does not have the force of an ordinance, so far as to justify the mayor in exercising his veto power in relation to it. Upon this branch of the case we are of the opinion that the resolution of June 26, 1899, passed by the city council of Joliet, was ineffective to establish the amount of the license fee to be paid by parties applying for license to sell liquor.

2. It is contended by the appellant in this case that Ordinance No. 796, passed on June 27, 1889, and fixing the dramshop license of the city at $1,000 per annum, payable in advance, had been repealed, and was not in force on July 1, 1899. It cannot be claimed with any show of reason that said ordinance was repealed by the resolution of June 26, 1899. An ordinance cannot be amended, repealed, or suspended by a resolution. The act which amends, modifies, or repeals a law should be of equal dignity with the act which enacts or establishes the law. A resolution or order is not a law, but merely the form in which the legislative body expresses an opinion. Chicago & N. P. R. Co. v. City of Chicago, supra; Horr & B. Mun. Ord. § 61; Jones v. McAlpine, 64 Ala. 511. But it is claimed that the

Ordinances—Repeal.

ordinance of June 27, 1889, was repealed by chapter 33 of the general revision of the ordinances of the city passed in 1891. The part of chapter 33 which is said to operate as a repeal of the ordinance in question is that portion of section 437 which contains the words "and paying for such license for the use of said city at a rate that may be from time to time established per annum." As has already been shown, this portion of the ordinance of 1891 cannot be regarded as otherwise than invalid, because of its conflict with the city charter in the respects already named. Being invalid, it could not operate as a repeal of the ordinance of June 27, 1889. Nor does the section in the revision of 1891 which provides that all ordinances of the city theretofore passed "in relation to the subject-matter of or inconsistent with any of the provisions of the following chapters * * * be and the same are hereby severally repealed," operate as a repeal of the ordinance of 1889. The latter ordinance related to the amount of the dramshop license, which was thereby fixed at $1,000 per annum, payable in advance. There was nothing in the chapters referred to of the revision of 1891 relating to the subject of fixing the amount of the dramshop license. Nor is there any inconsistency between the ordinance of 1889 and the provisions of the chapters referred to in the revision of 1891. Upon this subject we concur with the following statement made by the appellate court in their opinion: "Ordinance No. 796 relates solely to the amount of the license fee to be paid, which it placed at $1,000. While they are both upon the general subject of liquor licenses, yet the particular subject of each is different from the other. The subject-matter of one is the granting of licenses, and the conditions imposed upon those desiring to sell intoxicating liquors. The subject of the other is the rate to be paid by such parties for the privilege. The two are not inconsistent with each other, but both can stand, and neither interferes with the operation of the other." We are of the opinion that the ordinance of June 27, 1889, fixing the dramshop licenses of the city at $1,000 per annum, payable in advance, was in force in July, 1899, and that therefore the mayor was justified in refusing a license based upon the payment of a license fee of only $500. For the reasons above stated, the judgment of the appellate court is affirmed. Judgment affirmed.

RHOBIDAS

v.

CITY OF CONCORD.

(*Supreme Court of New Hampshire, March 16, 1900.*)

Common-Law Liability of City for Negligence of Waterworks Commissioners.*—A municipal corporation may be liable at common law for personal injuries caused by the negligence of a board of commissioners having control and management of waterworks, maintained under a legal authority by the municipality solely for fire purposes and for the benefit of its citizens, without profit to the city, if such commissioners were acting as the city's servants in some matter relating to the management of the waterworks.

Same—Whether Waterworks Commissioners Municipal Servants.—The act authorizing the defendant city to establish waterworks gave the full control thereof to the city, and provided that "the city may, either before or after the construction of the same, place them under the direction of a superintendent, or board of water commissioners, or of both, with such powers or duties as may, from time to time, be prescribed by the city council of said city." Acting under this authority the city passed an ordinance establishing a board of water commissioners, to whom it intrusted the entire management of its waterworks. It was contended that such ordinance was in effect the same as a statute enacted by the legislature, and that therefore such commissioners came within the class of independent officers, whose acts the city could not control or regulate, and for whom it was not liable. *Held*, that the commissioners were servants of the city.

Same.—Such commissioners were the officers of the whole city and not of any particular precinct, and, so far as they were answerable for their conduct, were answerable to the city, and not to any particular precinct. *Held*, that in an action for their official negligence, the city and not the precinct was the proper party defendant.

Action against city for personal injuries. Demurrer to answer. Demurrer sustained.

Walter S. Peaslee and E. A. & C. B. Hibbard, for plaintiff.

Sargent & Niles, for defendants.

Peaslee, J. The plaintiff's demurrer raises the question whether there is in this state any common-law liability of a municipal corporation, and, if there is, whether it exists in the class to which the present case belongs. While it is the law of this jurisdiction that towns are to a certain extent a

*See Little *v.* City of Holyoke, *ante*, page 27.

part of the state, and therefore not suable at common law, no case has gone so far as to hold that this rule applies to all cases. There are some expressions in Wooster v. Town of Plymouth, 62 N. H. 193, which might, taken alone, bear such interpretation; but that this is not their meaning is apparent from the fact that the opinion is expressly limited in its application to the corporate rights of towns "so far as they are involved in this suit," and relates to "their purely public capacity." Id. 221. The expressions are superfluous, if towns have not rights and duties which are not purely public. It is important to note that the question there involved was "whether, in the vindication of rights purely public, the state is constitutionally entitled to trial by jury, and, if it is not, whether in this case the defendants stand in the position of the state or in the position of a private person." Id. 194. The court did not understand that the earlier cases upon common-law municipal liability were involved in the consideration of this question; for, if there had been such understanding, it cannot be doubted that those cases would have received full consideration. Again, at the same term it was said in another case: "To charge a corporation with damages for injuries arising from misfeasance and neglect of duty, no statute fixing the liability, there must be acts positively injurious committed by authorized agents or officers in the course of the performance of corporate powers or in the execution of corporate duties, in distinction from those done in a public capacity, as a governing agency. * * * Municipal corporations may be liable for acts done under a grant of special powers not held under any general law, and from the execution of which some special profit or advantage is derived (Rowe v. City of Portsmouth, 56 N. H. 293); and generally, for injuries received from the negligent management of property not held for strictly public purposes, corporations are liable in the same way and to the same extent as individuals." Edgerly v. City of Concord, 62 N. H. 8, 19. In another opinion, also delivered at the same term, this language was used: "The city was dealing with and managing the land as a private owner deals with and manages his own property. Under such circumstances the defendants would be liable for an injury resulting from their want of care, in the same manner and to the same extent that an individual would for his negligent acts in the care and management of his property." Clark v. City of Manchester, 62 N. H. 577, 579. It is evident that many of the remarks in Wooster v. Town of Plymouth, which are correct as applied to the facts and questions of law involved in that case, are not applicable, and were not intended to refer to, cases involving dissimilar questions.

The mere fact that a town is engaged in the performance of a public duty is not enough to free it from all common-law liability for its acts, if the word "public" is to be taken in the broad sense of including every enterprise which may be sup-

ported by taxation. There is no case laying down such a doctrine in this state. Farnum v. Town of Concord, 2 N. H. 392, merely states the rule as applicable to an action by a traveler for damages caused by a defective highway, giving no reasons therefor. The Massachusetts case relied upon (Mower v. Inhabitants of Leicester, 9 Mass. 247) was decided upon the authority of Russell v. Men of Devon Co., 2 Term R. 667, and the reasons for the decision there have not been understood as going to the extent of denying all common-law liability of municipal corporations. See Mower v. Inhabitants of Leicester, 9 Mass. 250, note; Ball v. Town of Winchester, 32 N. H. 435, 442; Eastman v. Town of Meredith, 36 N. H. 284, 298; Hill v. Boston, 122 Mass. 344; Mayor of Lynn v. Turner, Cowp. 87. In the case last cited, the court of king's bench, speaking through Lord Mansfield, recognized the common-law liability of a municipality 14 years before the decision of Russell v. Men of Devon Co. In Ball v. Town of Winchester, supra, liability is denied upon the ground that highway surveyors are independent public officers, over whose acts the town has no control. So far as it decides that a town may, in the maintenance of highways, negligently flood the land of abutters, it is not now the law of this state. Gilman v. Town of Laconia, 55 N. H. 130. In Eastman v. Town of Meredith, 36 N. H. 284, 288, 295, 301, the decision is placed upon the ground that the action was based upon an injury to the plaintiff when in the exercise of a public right. If the injury had been caused by an infringement of a private right, the result might have been different. "If the defendants in the present case had laid and maintained the foundations of their town house across a stream, and caused the water to flow back on the plaintiff's land, according to these authorities they would have been liable." Id. 296. The general statements concerning liabilities of towns in Proctor v. Town of Andover, 42 N. H. 362, are dicta. The decision is expressly put upon the ground that it was not the duty of the town to maintain the gate in question. Hardy v. Town of Keene, 52 N. H. 370, only decides (so far as this case is concerned) that highway surveyors are not the agents of the town. "They are public officers, whose duties are prescribed by law. Their authority is not derived from the town, but from the statute. They are not under the control of the town. Their powers cannot be enlarged or abridged by any action of the town; and what they do or omit to do, in the proper exercise of their authority, is done or omitted because the law enjoins and prescribes their duties independent entirely of municipal control or authority." Id. 377. Edgerly v. City of Concord, 62 N. H. 8, applies the same rule to fire engineers. "They were public officers, amenable to law for their conduct, and not under control or direction of the city. They were not agents or servants of the city in any such sense as to bind it by their acts or make it liable for their defaults." Id. 20. In Clark

v. City of Manchester, Id. 577, it is said that a town is not liable for neglect to perform "a public corporate duty"; but this falls far short of saying that it is not liable for negligence in the performance of a public work, whereby private rights are infringed. In Sargent v. Town of Gilford, 66 N. H. 543, 27 Atl. 306, the nonliability of a town for defective highways at common law is upheld, because the duty to maintain them is imposed upon the town. "The duty is a public one, and it was placed upon towns without their procurement or assent. They derive no special benefit, pecuniary or otherwise, from the performance of it. The service is not due from them to the state or to the public by force of a common-law obligation, but it is imposed upon them by statute." Id. Certain remarks in Doolittle v. Town of Walpole, 67 N. H. 554, 38 Atl. 19, seem to be broad enough to warrant the assumption that a town is not suable in any case where the right of action is not expressly or impliedly conferred by statute, but these remarks were limited to "the purpose of the present inquiry." In Gross v. City of Portsmouth, 68 N. H. 266, 33 Atl. 256, nonliability is put upon the same ground as in Edgerly v. City of Concord, supra: "The water commissioners are not the city's agents, but an independent board. The city cannot direct or control them in the discharge of their duties. They have exclusive authority to determine where and in what manner water pipes shall be laid, and to do all other things touching the construction, maintenance, and management of the waterworks." Id., 68 N. H. 267, 33 Atl. 256.

A careful consideration of these cases must lead to the conclusion that there is no general rule by which the common-law liability of towns has been ascertained. That there is such a liability in certain cases is well established in this state. See cases hereinafter cited. What cases will or will not come within this class may be determined, to some extent, by a process of elimination. It appears that towns are not liable at common law (1) for the improper discharge of a purely governmental function (Eastman v. Town of Meredith, 36 N. H. 284; Doolittle v. Town of Walpole, 67 N. H. 554, 38 Atl. 19); (2) for neglect to perform duties imposed upon them without their consent (Sargent v. Town of Gilford, 66 N. H. 543, 27 Atl. 306); (3) for the acts of officers whose powers and duties are so fixed by the legislature that the town cannot control or direct their actions (Ball v. Town of Winchester, 32 N. H. 435; Hardy v. Town of Keene, 52 N. H. 370; Edgerly v. City of Concord, 62 N. H. 8; Gross v. City of Portsmouth, 68 N. H. 266, 33 Atl. 256). In every case in which it has been held that there was no liability, the decision has been placed upon one of these grounds. In no case has nonliability been put upon the broad ground that there is no common-law liability of a municipal corporation. On the other hand, there are numerous cases wherein towns were held to answer for their acts without any statutory liability either expressly or

impliedly imposed. Quantum meruit has been maintained to recover for building a highway, when the plaintiff had failed to perform a special contract. Wadleigh v. Town of Sutton, 6 N. H. 15; Davis v. Barrington, 30 N. H. 517. So, where a town let a house for a term of years, and the tenant made repairs, which were to be in lieu of rent, and was subsequently evicted before the end of the term, he was entitled to recover the value of the repairs to the town. Smith v. Newcastle, 48 N. H. 70. If a town so constructs a highway as to cause a nuisance upon the property of an abutter, the town is liable. Gilman v. Town of Laconia, 55 N. H. 130; Cole v. Gilford, 63 N. H. 60. The same rule applies to the construction of sewers (Vale Mills v. Nashua, Id. 136; Nutt v. City of Manchester, 58 N. H. 226), to a failure to properly care for highways after they are built (Parker v. City of Nashua, 59 N. H. 402), and to cases where the improper construction was not authorized, but has been paid for, and the benefit accepted (Carpenter v. City of Nashua, 58 N. H. 37). Where the work of maintaining sewers is voluntarily undertaken, the town is liable for injuries to private property resulting from negligence in such work. Rowe v. City of Portsmouth, 56 N. H. 291. The court has also sustained actions against towns for the obstruction of a private way (Willey v. City of Portsmouth, 64 N. H. 214, 9 Atl. 220), for money paid to discharge a debt due from the town (Sanborn v. Town of Deerfield, 2 N. H. 251), for the expenditures of a committee to purchase land for a cemetery (Eastman v. Town of Hampstead, 66 N. H. 195, 20 Atl. 975), for labor and materials performed and furnished in the construction of waterworks (Leavitt v. Dover, 67 N. H. 94, 32 Atl. 156), and for the expenses of a committee before the legislature (Rider v. City of Portsmouth, 67 N. H. 298, 38 Atl. 385; Batchelder v. Town of Epping, 28 N. H. 354). If towns were mere divisions of the state, and could not be sued without authority from the legislature, many of these actions would have failed. The argument that the question of municipal nonliability was not raised in them is not well founded in fact. While the cases as reported do not, in most instances, mention this question, an examination of the reserved cases and the arguments of counsel will show that it was often before the court. See Carpenter v. City of Nashua, 104 Briefs & Cases, 649; Cole v. Gilford, 146 Briefs & Cases, 281; Vale Mills v. Nashua, 147 Briefs & Cases, 239.

So far as the questions involved in this branch of the law have been considered, the decisions seem to recognize three classes of cases in which towns are liable for torts at common law: (1) For negligent acts (even in the discharge of imposed duties) which interfere with the rights of others, provided such rights do not depend upon the imposed duty. Gilman v. Town of Laconia, 55 N. H. 130; Carpenter v. City of Nashua, 58 N. H. 37; Parker v. City of Nashua, 59 N. H. 402; Willey v. City of Portsmouth, 64 N. H. 214, 9 Atl. 220. (2) For their

acts concerning property not employed in a public use. Clark v. City of Manchester, 62 N. H. 577. (3) Where duties of a public nature are voluntarily assumed. Rowe v. City of Portsmouth, 56 N. H. 291. The question of the soundness of the second and third classes is not involved in this case, and is not considered. There is no substantial conflict between the decisions. The court has not said that a town was not engaged in a public or governmental service when repairing sewers (Rowe v. City of Portsmouth), and that it was so engaged when constructing waterworks (Gross v. City of Portsmouth). The nature of the work was the same in both cases, but in the latter the work was performed by persons over whose actions the city had no control, while in the former it was done by agents whom the city might direct as to time and methods of work. It is for this reason that there was a liability in one case, and not in the other. Nor are these decisions based upon an ascertainment of what is or is not a public office. It was not the nature of the duties to be performed, but the fact that in doing them the actor was or was not subject to control by the town, that determined the question of liability. The decisions resulted from an application of the rule that one is not liable for the negligent acts of those whose conduct he has no right to direct or supervise. 2 Dill. Mun. Corp. § 974. "The maxim respondeat superior depends on the presumed control implied by the relation between the parties." Carter v. Mills Co., 58 N. H. 52, 53. Nonliability has not been put upon the same ground in all cases; nor have the cases in which a liability was found to exist all depended upon a common rule. It is only in an attempt to put upon a common ground cases which involve different principles that confusion arises. When the cases are properly classified, they appear to be consistent with each other, and, in a general way, with the law of other states. See 2 Dill. Mun. Corp. §§ 962, 966, 971, 974, 981, 985. Viewed only with reference to the work in which the town was engaged, the decision in Sargent v. Town of Gilford, 66 N. H. 543, 27 Atl. 306, that the town was not liable at common law for injuries received by a traveler by reason of a defect in a highway, might seem to conflict with the holding that a town was so liable for building a highway so as to flow water over the abutter's land. Gilman v. Town of Laconia, 55 N. H. 130. But the reason for the different results is plain. To establish his case a plaintiff must show that he had a right which has been infringed. In Sargent v. Town of Gilford, the only right upon which the plaintiff could rely was the public one of using the highway, and the only duty of the town was the statutory one to maintain the way. The plaintiff's injury was suffered while he was in the exercise of a public right, and for this no action lies at common law. Eastman v. Town of Meredith, 36 N. H. 284. Take away the public right, and the plaintiff would stand only as a trespasser, to whom the town would owe no positive duty as

to the condition of the premises. Buch v. Manufacturing Co., 69 N. H. 257, 44 Atl. 809. "The wrong thus complained of is not * * * in violation of the plaintiff's common-law right and the defendant's common-law duty, but a violation of the statutory, highway right of a traveler, by a nonperformance of the defendants' statutory duty of keeping the highway 'in good repair, suitable for the travel thereon.'" Doe, C. J., Edgerly v. City of Concord, 59 N. H. 78, 79. As no private right had been infringed, the plaintiff had no cause of action at common law. In Gilman v. Town of Laconia the situation was different. The right there invaded was the private right of property. The plaintiff complained, not that the town had failed to perform some public duty, but that it had invaded his property right. It was no answer to this complaint to say that the town was engaged in a public undertaking, or even that it was performing a public duty imposed upon it against its will. If such a defense were available, private rights would not be secure against arbitrary forfeiture, and the implied constitutional provision against taking private property for public use without compensation would be abrogated. Eaton v. Railroad, 51 N. H. 504, 511. "'We can solve more easily and safely questions of this character if we take pains to free our minds from the false notion that a municipality has some indefinable element of sovereign power, which takes from the property of the citizen, as against its aggressions, the protection enjoyed against the aggressions of a natural person.' The same constitutional provision that protects the right of private property against invasion by private individuals 'must protect it from similar aggressions on the part of municipal corporations.'" Jeremiah Smith, J., Eaton v. Railroad, supra, 534.

In many of the cases where a recovery has been had, the action was justified by being necessary to carry out the spirit of the supreme statute law. Although our constitution contains no express declaration that private property shall not be taken for public use without compensation, that rule is implied from the spirit of equality which pervades its every part. Eaton v. Railroad, supra, recognizes the doctrine that this rule authorizes suits against municipalities for damage to property occasioned in the execution of a public work. It is urged that this rule applies only to property that is taken directly for, and not merely in the course of the execution of, public works. For example, if it is useful for a municipality to lay a water pipe across A.'s land, he is to be compensated; and, if the act be done without process of law or his consent, he may have redress. On the other hand, if in the building of the same waterworks the superintendent negligently floods B.'s garden, it is said that the corporation is not liable, because the act does not inure to the benefit of the municipality. If this reasoning were sound, it would follow that the measure of A.'s damages would be the benefit to the municipality; and

the fact that he is entitled to the value of the property taken shows conclusively that the right to recover rests upon a broader principle than that of an implied promise to pay for benefits received. In these matters "the dictate of justice is that no person shall suffer unequally, and, if he does, that all should make compensation." 2 Dill. Mun. Corp. § 1051c.

It is also said that the flooding of B.'s land is not the result of a public work, but of the negligence of the superintendent, and therefore the municipality is not liable. The answer to this is that the law so far takes notice of the fallibility and imperfection of all human endeavor that one who intrusts his affairs to his servant, under instructions, either express or implied, to do only that which is lawful, is responsible for the neglect of the servant so to do. The general rules of agency apply to towns. They are "subject to the same implications from their corporate acts, or the acts of their agents within the scope of their authority, without either vote, deed, or writing, as in the case of natural persons." Town of Holderness v. Baker, 44 N. H. 414, 417; Glidden v. Town of Unity, 33 N. H. 571, 577; Gray v. Town of Rollinsford, 58 N. H. 253; Kinsley v. Norris, 62 N. H. 652.

The claim is also advanced that it is unconstitutional to take the taxpayer's property to pay damages caused by the negligent acts of the superintendent; that the power to tax extends only to public purposes, and not to making reparation for injuries done by public agents. The argument proves too much. It denies the right to tax for any but strictly governmental purposes, while the law is that "in determining this question the legislature cannot be held to any narrow or technical rule. Not only are certain expenditures absolutely essential to the continued existence of the government and the performance of its ordinary functions, but as a matter of policy it may sometimes be proper and wise to assume other burdens which rest entirely upon considerations of honor, gratitude, or charity." Cooley, Const. Lim. *488. For many years towns in this state have been called upon to respond to suits to enforce a statutory liability for damages caused to individuals by a failure to keep highways in repair. Although there was no such liability at common law, and although the nature and extent thereof under the statute has been treated of at great length, it has never before been suggested that the statute was an unconstitutional infringement of the rights of taxpayers. If their property may be taken for a liability which was unknown to the common law, much more may it be for municipal obligations which the common law recognized.

The argument that, according to a perfect theory of the nature and end of all government, municipalities partake of the sovereign character of the state, and so cannot be liable to suit except when made so by statute, has not been overlooked. The argument would be entitled to weight if this was a new question, but that is not the present situation. It

may be that a corporation, in part governmental and sovereign, and in part individual and accountable, does not satisfy the demands of pure reason, or realize the ideal of those skilled in political science. The same thing may be said of many of the rules of the common law which have been adopted, yet those rules are of binding obligation. Thompson v. Esty, 69 N. H. 55, 45 Atl. 566. So as to the nature of municipal corporations. The theory of their dual character is too firmly imbedded in the common law to be removed, except by the lawmaking power. Whether it would be better if they were liable for every breach of duty, as suggested in Ball v. Town of Winchester, 32 N. H. 435, 442, or whether, as the defendants here contend, they ought not to be liable at all, is a question to be settled by the legislative department of the government. Ever since the time of the Roman empire, municipalities have been subject to private law relations not applicable to sovereignty. 1 Dill. Mun. Corp. § 3. The exact location of the divisional line between those matters which are governmental and those which are not has not always been clearly indicated. Courts have not agreed upon the precise location of the line, but there has been no dissent from the proposition that municipalities have duties on each side thereof. This has been the law of the state for many years. It may fairly be assumed that many instances of legislative action or nonaction have been based upon it. Like the doctrine of the peculiar corporate character of proprietors of towns, the authority for it is to be found "in the records of New England, in the decisions of courts." Proprietors of Cornish v. Kenrick, Smith (N. H.) 270, 273. It is a part of the common law, and cannot be abolished except by the lawmaking power.

It may be, and probably is, true that the decided cases do not cover every phase of common-law municipal liability that may arise; but, as they have sufficiently established the law for the purposes of the present case, it is not essential to pursue the general subject further. Nor is it necessary to inquire whether the grounds upon which nonliability has been placed are sound. The cases in which such a conclusion has been reached are of consequence here only so far as an investigation of them is needed to show that they are not based upon a theory of general municipal immunity from suit. Taking the law as it has been declared in this state, a town is liable for the negligence of its agents which affects the private property right of others. Is it any less liable when the right involved is personal instead of proprietary? The basis of the cause of action is the infringement of a private right,—a violation of those rules of conduct which from being custom became law, and which now govern the conduct of all in their relations to others, be those relations either personal or proprietary. A private right is infringed when a person's health is injured by emptying a sewer wrongfully in the vicinity of his residence, the same as when water is wrongfully turned upon his land. "On the

question of liability, it might not be material whether the invasion were of bricks or of polluted atmosphere." Towne v. Thompson, 68 N. H. 317, 322, 44 Atl. 492. The case does not differ in principle from that of an employee, who is entitled to be provided with a reasonably safe place in which to work, and to be associated with reasonably competent fellow servants. The landowner's right of property and the laborer's right of personal safety are alike given by the common law. They are both private rights, and the invader of the one is no more bound to answer for his acts than the infringer of the other. "The whole superstructure of the liability of municipal corporations for negligence and for trespasses upon property is built upon the same idea, since there can be no distinction on principle between the case where a municipal corporation—let us say in the prosecution of some public work within its charter powers—unlawfully damages my property or injures my person, and where, acting for its own purposes and within the scope of its charter powers, it takes my property." Seymour D. Thompson in 33 Am. Law Rev. 708.

The rule which governs this case is clearly stated by Perley, C. J., in Eastman v. Town of Meredith, 36 N. H. 284, 295, where it is said: "The plaintiff in cases of this character does not recover on the ground that he has been denied any public right which the corporation owed to him as a citizen of the town, or because he has suffered an injury in the exercise of a public right, from neglect of the town to perform a public duty. The corporation being authorized by law to execute the work, if in their manner of doing it they cause a private injury they are answerable in the same way and on the same principle as an individual who injures another by the wrongful manner in which he performs an act lawful in itself. It has been sometimes made a question whether in the particular case the corporation were liable as principals for the conduct of those who performed the work on their account; but, where a work is once conceded to be done by the corporation, it would seem to be clear, on authority and general principles, that a corporation, public or private, must be held liable, like an individual, for injuries caused by negligence in the process of executing the work." For more than 40 years this decision has been acted upon as correctly stating the law applicable to this class of cases. It states the law, not only of this jurisdiction, but of every jurisdiction where the common law prevails. "It is * * * universally considered, even in the absence of a statute giving the action, that" municipal corporations "are liable for acts of misfeasance positively injurious to individuals, done by their authorized agents or officers in the course of the performance of corporate powers constitutionally conferred, or in the execution of corporate duties." 2 Dill. Mun. Corp. § 966. The case which announced the adoption here of this unquestioned rule of the common law cannot be held to have been overruled, together with the cases

which have followed it, by remarks made in a case where the question was not involved, and in which these cases are not mentioned. The case at bar falls within the rule laid down by these authorities. The complaint is of wrongful acts injurious to an individual. The term "private injury," as used in Eastman v. Town of Meredith, supra, is syonymous with "private wrong," which is defined as "an infringement or privation of the private or civil rights belonging to individuals, considered as individuals," as distinguished from public wrongs, which "are a breach and violation of public rights and duties which affect the whole community, considered as a community." 3 Bl. Comm. 2. "Private wrongs, * * * being an infringement merely of particular rights, concern individuals only, and are called 'civil injuries.' * * * Public wrongs, * * * being a breach of general and public rights, affect the whole community." 1 Bl. Comm. 122. To determine what conditions or situations have the elements of private rights, as above defined, reference must be had to the positive law. The terms "private wrong" and "private right" cannot be defined, further than to say that they include all those duties due from one person to another, for the breach of which the law gives an action. See 4 Bl. Comm. 5, note; Ladd v. Brick Co., 68 N. H. 185, 37 Atl. 1041. Except as to those guarantied by the constitution, private rights may be modified or enlarged by legislative action; but until this is done they remain as they were at the common law. So in this case the contract of the parties created a situation which gave the plaintiff the common-law right to be furnished a reasonably safe place in which to work. The existence of the right cannot be doubted. It was a "particular right" concerning the individual only, and not one which "affected the whole community." It was in every sense such a right that a negligent violation of it would be a civil injury or private wrong. It in no way depended upon the performance or nonperformance by the defendants of any public duty.

Were the water commissioners servants of the city, or were they an "independent board," whom the city could not "direct or control" "in the discharge of their duties"? The act authorizing the city to establish waterworks gives the full control thereof to the city, and provides that "the city may, either before or after the construction of the same, place them under the direction of a superintendent, or board of water commissioners, or of both, with such powers and duties as may, from time to time, be prescribed by the city council of said city." Laws 1871, c. 69, § 5. Acting under this authority the city passed an ordinance establishing a board of water commissioners, to whom it intrusted the entire management of its waterworks. Rev. Ord. Concord 1894, c. 22, §§ 2, 4. It is argued that this ordinance is in effect the same as a statute enacted by the legislature, and that therefore the commissioners come within the class of independent officers, whose acts the

city cannot control or regulate, and for which it is not liable. The defect in this reasoning is apparent. The officer whose duties are fixed by the legislature is beyond the control of the city, and, however much it may desire to change those duties, it is powerless to do so. On the other hand, the ordinance in this case, although enacted in the form of legislation, is a mere rule of conduct or delegation of authority given by the city itself to those employed in its service. It may change the duties or take away the powers granted at any time, and the ordinance in express terms reserves to the city councils the right to remove the commissioners. Id. § 3. The commissioners were servants of the city. Grimes v. Keene, 52 N. H. 330, 335.

The defense that the suit should be against the precinct, and not against the city, is not available. "The water commissioners are the officers of the whole city, and not of the precinct, are elected by the city councils, and, so far as they are answerable for their conduct, are answerable to the city, and not to the precinct." Brown v. City of Concord, 56 N. H. 375, 379. Demurrer sustained.

Parsons and Young, JJ., concurred in the result only, holding that there is a statutory liability, and dissenting from the decision that there is a liability at common law. The others concurred.

Ex parte FEDDERWITZ.

(*Supreme Court of California, Nov. 26, 1900.*)

[62 Pac. Rep. 935.]

Statute—Justice of Peace—Construction.—Code Civ. Proc., § 103, as amended by St. 1899, p. 88, provides that in every city or town of the fourth class there shall be one justice of the peace. St. 1883, p. 24, as amended by St. 1899, p. 141, provides that all municipal corporations having a population of 10,000 and not exceeding 15,000 constitute the fourth class, and that there may be a special enumeration to determine the population of a city, which when made shall be deemed the number of inhabitants of such city for the purpose of legislation affecting municipalities. St. 1895, p. 409, in the preamble to a resolution ratifying the freeholders' charter of a town, recited that such town had a population of more than 10,000. *Held*, that the office of justice of the peace for such town had a legal existence, and could be legally filled.

Same—Recital in Charter Conclusive.—Where the legislature, in the preamble to a resolution ratifying a freeholders' charter for a city, recited that such city contained a population of more than 10,000, such resolution, with the charter it establishes, being a law of the state, is conclusive as to the fact recited in the preamble.

Same—Habeas Corpus—Conviction by Justice.—Where the office of

justice of the peace in a city has a legal existence, the title of the incumbent cannot be attacked in *habeas corpus* proceedings by a party convicted before such justice of violation of a municipal ordinance.

Ordinance—Validity.—A city ordinance providing that it shall be a misdemeanor for any person to sell or give away any spirituous liquors within the city, except a licensed druggist selling on the prescription of a regularly licensed physician, which does not conflict with any general law of the state, is valid, though it prohibits a single act of selling or giving away malt and spirituous liquors by one not engaged in the liquor traffic.

Same—Sale of Liquor—Allegation in Complaint.*—Where a city ordinance provides that it shall be a misdemeanor for any person to sell or give away any malt or spirituous liquors within the city except a licensed druggist selling on the prescription of a regularly licensed physician, a complaint charging a violation of such ordinance need not allege that defendant was not a licensed druggist, since that is a matter of defense.

TEMPLE, HENSHAW, and HARRISON, JJ., dissenting.

In bank. Application for a writ of habeas corpus by George Fedderwitz against Oscar L. Rogers and another. Petition denied.

Chapman & Clift and A. L. Frick, for petitioner.

Brewton A. Hayne and Fox & Gray, for respondents.

Beatty, C. J. The petitioner was convicted before Robert Edgar, claiming to be justice of the peace of the town of Berkeley, of violating an ordinance of that municipality. On appeal to the superior court the judgment of the justice's court was affirmed, and in pursuance thereof petitioner is held in custody of the sheriff of Alameda county. He claims that his imprisonment was unlawful: First, because there is no justice's court of the town of Berkeley; second, because the ordinance defining the offense of which he was convicted is void; and, third, because the complaint upon which he was prosecuted does not charge the offense defined in the ordinance.

Case Stated.

It is assumed by counsel for petitioner that the question to be determined in this proceeding under his first point is in all respects the same as the question decided in Miner v. Justice's Court, 121 Cal. 264, 53 Pac. 795, and that it must be decided the same way, unless some legislation subsequent to the decision of that case can be found which leads to a different result. But in this assumption I think counsel are mistaken. The questions are not the same. In the former case the proceeding was by mandamus to compel the issuance of an execution upon a judgment rendered by the justice's court,—consisting of two justices of the peace,—

*As to power of municipality over liquor traffic, see Brown *v.* Town of Social Circle (Ga.), 1 Mun. Corp. Cas. 411, and *notes*, 412 *et seq.*

which the legislature had attempted to create by the special and local act of March 27, 1895 (St. 1895, p. 205). It was claimed on the part of petitioner in that case that there was such a justice's court for the town of Berkeley created by that act, or, if not, that the court of similar title created by the original act of incorporation (St. 1877–78, p. 888) continued in existence notwithstanding the adoption of the freeholders' charter of March 25, 1895. Both points were ruled the other way, the court holding that the old court was abolished by the adoption of the freeholders' charter, and that the act attempting to create a new court was invalid because local and special; and, having thus disposed of the only questions presented by council for its consideration, the court denied the writ of mandate without considering the question presented by this case, viz. whether there is or can be a justice of the peace for the town of Berkeley. If, by legal possibility, there may be a justice of the peace lawfully exercising the powers of that office for the town of Berkeley, the right of Robert Edgar to act in that capacity cannot be drawn in question in this proceeding. If there can be a de jure officer, the right of the de facto officer cannot be collaterally assailed.

That the office of justice of the peace for the town of Berkeley has a legal existence is, I think, very clear. In the first place, it has been the law ever since 1880 that there shall be one justice of the peace in every city having 10,000 and not more than 20,000 inhabitants. Code Civ. Proc. § 103. This is part of a general law of the state (Id. § 85 et seq.), the constitutionality of which has been frequently affirmed. Bishop v. City of Oakland, 58 Cal. 572; People v. Ransom, Id. 558; Coggins v. City of Sacramento, 59 Cal. 599. It will not be contended, I suppose, that Berkeley is not a "city," within the meaning of this act, because it has styled itself in its charter the "town" of Berkeley; and, if it is a city, it became entitled to a justice of the peace as soon as the fact was legally established that it had over 10,000 inhabitants, and this fact was legally established in the most solemn and conclusive manner by the preamble to the joint resolution of the legislature of March 5, 1895 (St. 1895, p. 409), approving the freeholders' charter. At the date of that resolution it was necessary that a city should have a population of at least 3,500 before it could frame a freeholders' charter (Const. art. 11, § 8, as amended in 1892), and it was the undoubted right and duty of the legislature to ascertain the population of Berkeley before acting upon the proposed charter. This the legislature did, and in the preamble to the resolution ratifying the charter it recited and proclaimed the fact that the town of Berkeley contained a population of more than 10,000 inhabitants. This resolution with the charter which it establishes is a law of the state, and is conclusive as to the fact so recited in the preamble.

Statute—Justice of Peace—Construction.

Same—Recital in Charter Conclusive.

If, therefore, the law assigning one justice of the peace to every city with a population of more than 10,000 and not exceeding 20,000 had remained unchanged, I should have no hesitation in holding, upon this ground alone, that the office of justice of the peace for the town of Berkeley has existed ever since the 27th of March, 1895; and, although this conclusion might appear to be at variance with the conclusion reached in Miner v. Justice's Court, it is not inconsistent with anything actually considered or decided in that case. There the whole contention of counsel was in regard to the validity of the special act of 1895 creating a court consisting of two justices of the peace. It was assumed throughout the argument that, if the act of 1895 was invalid, there was no justice's court in Berkeley, unless it could be held that the provisions of the old charter of 1878, establishing a justice's court, remained in force notwithstanding the freeholders' charter of 1895. The argument of counsel being directed exclusively to these propositions, they alone were considered in deciding the case. If our attention had been called to the provisions of section 85 et seq. of the Code of Civil Procedure, and the population of the city as declared in the resolution of the legislature approving the freeholders' charter, we could not have held that the office of justice of the peace of the town of Berkeley did not exist at that time. And in fact we did not so hold. All we decided was that the court—consisting of two justices, of which alone Gentry claimed to be a member—had no legal existence. But since the decision of that case there has been new legislation, or attempted legislation, affecting the office of justice of the peace in cities and towns. On March 10, 1899, an act was passed to amend section 103 of the Code of Civil Procedure. St. 1899, p. 88. Before amendment it was provided in that section that in cities having a population of more than 20,000 and not exceeding 100,000 there should be two justices of the peace, and in cities having a population of more than 10,000 and not more than 20,000 there should be one justice of the peace. By the amendment this classification was discarded, and in place thereof it was provided that in every city or town of the third or fourth class there should be one justice of the peace, and in every city or town of the second class there should be two. Some question is made as to what is meant in this amendment by cities of the second, third, and fourth classes, but to this question there can be but one answer. The only classes of cities known to our laws are those defined in the act of March 2, 1883 (St. 1883, p. 24), entitled "An act to provide for the classification of municipal corporations," by which all such corporations in the state were divided into six classes according to population, those having a population of more than 10,000 and not exceeding 15,000 constituting the fourth class. This undoubtedly is the classification to which the amended section refers. But, if this must

be conceded, the petitioner contends that the object of this act was to classify cities and towns solely for the purpose of incorporation and organization under the general municipal incorporation act, which the new constitution enjoined, which was then under consideration, and which was subsequently passed at the same session of the legislature. St. 1883, p. 93. To this it may be answered that the title of the act does not indicate any such limited purpose, and the language of the first section is broad enough to embrace every purpose (including the assignment of justices of the peace, for which a classification by population might be expedient or permissible. In succeeding sections of the act, however, are contained provisions which indicate very plainly that the main, if not the only, purpose of that particular classification at that time was to establish a basis for the organization and reorganization of cities and towns under the general incorporation act. That it was not intended to serve as a basis for the appointment of justices of the peace is further shown by the fact that a classification already established for that purpose (Code Civ. Proc. § 85 et seq.) was left undisturbed. But, conceding all this, the conclusion which the petitioner would draw from the original purpose of the act does not follow. His contention appears to be that section 103 of the Code of Civil Procedure is meaningless and void, because its provisions are based upon a classification originally adopted for the purposes of legislation upon another subject; a proposition to which we cannot accede. There is no reason why a classification of cities and towns by population originally adopted by one legislature for a particular purpose may not be referred to or made use of by a succeeding legislature for other purposes of legislation to which a similar classification is essential, and for which it will conveniently serve; and there would be neither reason nor excuse for holding the amended section 103 of the Code of Civil Procedure meaningless and void merely because it has made an act passed for one purpose serve another purpose equally legitimate. For it is to be remembered that there is here no question of the power of the legislature or validity of the law. It is a mere question of construction that we have to deal with, and, if there is a discoverable meaning in the statute, we have nothing to do but to declare and enforce it. That it has a meaning, and a very plain meaning, I cannot doubt.

But it is contended that, if this amendatory act refers to the classification of the act of 1883, it embraces only such cities and towns as have been incorporated under the general incorporation act; the proposition being that, unless a city or town has been so incorporated, it does not belong to any of the classes defined in the act of 1883, and especially if it has been incorporated under a freeholders' charter, as Berkeley has been, it does not belong in any class. So far as this argument depends for its support upon a construction of the amendatory

act itself, it is refuted by the plain terms of the second section, which expressly provides that it shall not apply to cities incorporated under the general incorporation act; and, since they are made the only exception, the law must embrace all cities and towns with special charters. If, on the other hand, petitioner's contention depends upon the proposition that the classification act of 1883 applies only to cities and towns organized under the general incorporation act, the argument is equally unsupported. When that act was passed, there was no general law in existence for the incorporation of cities and towns, and, as a necessary consequence, there were no such cities and towns to be classified. Considered by itself, and without reference to prospective legislation, if it classified any municipal corporations it must have classified those cities and towns theretofore organized under special charters antedating the new constitution. Considered with reference to contemplated legislation,—that is to say, with reference to the bill then before the legislature, and subsequently passed, providing for the incorporation of cities and towns under the general law,—it follows with equal certainty that the law embraced all existing corporations; for upon this view, and upon this view alone, can the two acts be harmonized. By the general incorporation act (St. 1883, p. 93) provision was made in the first three sections for the incorporation of the inhabitants of unincorporated territory of the respective counties, and then, by section 4, provision was made for the reincorporation under that act, and in their proper classes, of cities and counties, cities and towns, which had been previously incorporated under special charters. This would seem to prove conclusively, if any proof were needed outside of its title and its express terms, that the classification act of 1883 was intended to embace all incorporated cities and towns then existing; and there is, to my apprehension, no reason for holding that it was not also intended to stand as a part of the permanent legislation of the state, and to have its legitimate operation, according to its terms, upon all cities and towns thereafter incorporated, whether under the general act then in preparation, or under freeholders' charters, as provided in the constitution. But, whether such was the original intention or not, there can be no doubt, in view of the second section of the act amending section 103 of the Code of Civil Procedure, that the legislature of 1899 understood that the act of 1883 embraced all cities having special charters, and that they intended its classification to serve in such cities, and in such cities alone, as the basis for the apportionment of justices of the peace. This view is, I think, sufficiently supported by the considerations above suggested, but it is made more evident by a significant amendment to the classification act of 1883, contained in the act of March 20, 1899 (St. 1899, p. 141). It was provided in the original act that the decennial census of the United States should determine the population of the respective cities and towns,

unless there should be a special enumeration of their inhabitants made under certain prescribed conditions. The legislature, recognizing that such special enumeration was originally authorized for the sole purpose of enabling a city or town to reorganize, if it so desired, under the charter of the higher or lower class to which it had risen or been reduced by gain or loss of population, and evidently anticipating the argument of the petitioner in this case, deliberately amended the act by inserting an express declaration that the special enumeration, when made, should serve the purposes of all legislation affecting municipalities. The original act, before amendment, provided fully and explicitly for the enumeration, and for the proceedings to be taken in order to effect a reorganization in a new class. Everything necessary for this purpose was fully and elaborately provided, and no amendment of the law was called for unless its scope was to be enlarged. This being so, the terms of the amendment seem peculiarly significant. It reads as follows: "Whenever the result of such enumeration shall have been declared by the council, board of trustees, or other governing body, and entered in the minutes of such body, thereupon the number of such inhabitants so ascertained shall be deemed the number of inhabitants of such city for all purposes of this act, and for the purposes of legislation affecting municipalities." To say that the amended act means nothing more than it meant originally is to violate fundamental principles of construction. Clearly, the amendment was intended to accomplish something, and that was to enable the inhabitants to secure to themselves the benefits of any general legislation applicable to cities and towns according to population without waiting 10 years for the United States to take a census. If this were doubtful upon the terms of the statute, the doubt would be removed by the fact that the amendment was made by the same legislature, at the same time, and evidently as a part of the same scheme, as the amendment to section 103 of the Code of Civil Procedure. At the same time that they changed the law so as to apportion justice of the peace according to the general classification of the act of 1883, they enlarged the scope of the enumeration provided for in that law so that it might serve to determine the proper number of justices in each city and town. From all of which considerations it clearly results that, if the town of Berkeley is a city of the fourth class, the office of justice of the peace exists there by force of the amendment to section 103 of the Code of Civil Procedure, if that amendment is constitutional.

But it is still further contended that Berkeley is not a city of the fourth class in any sense attributable to the statute. I have already considered the objection that because it is organized under a freeholders' charter, or, rather, because it is not organized under the general incorporation act, it belongs to no class created by the act of 1883; and I think it has been demonstrated that even under the original act it falls into its

proper class by virtue alone of the number of its inhabitants, and certainly that it is comprehended in the classification of the amended law.

The other objection under this head is that the mere ascertainment of the fact that Berkeley has risen to a population exceeding 10,000 does not put it into the fourth class. This contention is based upon section 3 of the classification act and the point supposed to have been decided in Re Mitchell, 120 Cal. 384, 52 Pac. 799. The whole contention, however, is based upon a confusion of terms, and is unaffected by anything decided or involved in Re Mitchell. The question discussed in that case in both the principal and concurring opinions was whether the police court of Los Angeles had ceased to exist the moment it was ascertained by a special enumeration that the population of the city exceeded 100,000, and all that was decided was that changes of municipal organization do not take place automatically in consequence of changes of population which remove cities from one class to another. This is quite in consonance with the provisions of the classification act. A city of the fourth class, organized under the charter of that class, retains its charter notwithstanding an increase of population which puts it in the third class. But it does not follow that because its charter remains unchanged its class remains unchanged. On the contrary, the privilege of changing its charter depends upon a change of class. The charter has nothing to do with fixing its class. That is dependent on population alone, which is an element of all cities, however organized. In organizing under the general law a city must accept the charter of its proper class; but, unless it elects otherwise, it retains its original charter, no matter to what class it may rise or fall by change of population. This is the whole effect of the decision in Re Mitchell, and it does not conflict with the proposition that Berkeley, like every other city of California, becomes at once, within the meaning of our statute law, a city of the class to which its legally ascertained population assigns it. As to the remark in Justice Henshaw's concurring opinion that legislation mediate or immediate is necessary to change the municipal organization, that view is satisfied by any formal, legal, and appropriate action of the local authorities following upon an ascertained change of population. With respect to the election or appointment of a justice of the peace in a city whose population has come to exceed 10,000, an election duly called by the proper authority, or an appointment duly made, should be deemed sufficient. By such action no inconvenience could accrue, and great inconvenience might, in many cases, be avoided. As to Berkeley it has been pointed out that its population was ascertained and proclaimed by the legislature in 1895. This alone would determine its status as a city of the fourth class. But there has also been made a special enumeration of its inhabitants conforming to all the requirements of the amended act

of 1899, above quoted, which also establishes the fact that it is a city of the fourth class for all purposes of legislation. Subsequent to this enumeration, Edgar was duly appointed to the office of justice of the peace.

Passing now from these questions of construction, which have been more fully considered, perhaps, than necessary, we come to the last contention of petitioner on this head, viz. that the act amending section 103 of the Code of Civil Procedure is unconstitutional, because it is a special law in a case where a general law could be made applicable. It is said, in the first place, that the law is special because it makes no provision for cities of the first class or for cities below the fourth class. But this objection overlooks the fact that provision is made for cities of the first class in the unamended sections of the same chapter of the Code (section 85 et seq., Code Civ. Proc.), and that it has never been deemed an objection to the validity of that law that no provision was made for justices of the peace in cities and towns of less than 10,000 inhabitants. For them the township justices are deemed sufficient. It is next said that the law is special, because cities organized under the general law are excluded from its operation. This is, to my mind, a much more serious objection to the validity of the law, and, speaking for myself, I should be inclined to hold that, unless the exception of that class of cities can be disregarded, the amendment is void. But this question does not require a decision in this case. Concede, for the present, that the amendment is void, and that the town of Berkeley is not entitled to a justice of the peace as a city of the fourth class, the simple result is that section 103 of the Code of Civil Procedure remains unamended, and Berkeley may claim a justice of the peace as a town of 10,000 inhabitants. The only real importance of this act in the present controversy consists in the light it sheds upon the meaning of the amended provisions for the special enumeration of inhabitants of municipal corporations, and, whether constitutional or not, it shows the same intention on the part of the legislature.

Upon the foregoing considerations our conclusion is that in any possible view of the law the office of justice of the peace for the town of Berkeley has had a legal existence ever since the ratification of the freeholders' charter in 1895. The office existing, it could be legally filled, and the title of the incumbent cannot be assailed collaterally in this proceeding.

Same—Habeas Corpus—Conviction by Justice.

The next question to be considered is the validity of the ordinance under which the petitioner was convicted. The second section of the ordinance reads as follows: "From and after the first day of October, 1899, it shall be a misdemeanor for any person, either personally or by an agent or agents, or servant or servants, or employee or employees, or as agent, servant or employee, within the limits of the town of Berkeley to sell or keep for

Ordinances—Validity.

sale, or offer for sale, or give away, or permit, for any consideration, to be given away, directly or indirectly, any vinous, malt or spirituous liquors, or any mixture thereof, or any alcoholic or intoxicating liquors of any kind, or to establish, open, maintain or carry on, any tippling house, dramshop, cellar, saloon, barroom, billiard room or any other room or place where any such liquors are sold, or kept for sale, or are given away, directly or indirectly, within said town: provided, however, that the provisions of this ordinance shall not apply to the sale of liquors by any licensed druggist upon prescription of a physician regularly licensed to practice medicine under the laws of the state of California, whose prescription and the sale thereunder, and the name of the person to whom the sale is made, shall be recorded by the druggist in a book to be kept for that purpose, which shall be open for the inspection of any citizen of Berkeley demanding an inspection thereof." A great many objections are urged against these stringent prohibitions, but it will be unnecessary to consider any except those which apply to the mere selling and giving away of intoxicating liquors by persons not regularly engaged in the traffic, such as keepers of barrooms, tippling houses, etc. The charge upon which petitioner was convicted was that of selling and giving away malt and spirituous liquors. It is not alleged that he kept a saloon, or that he was otherwise engaged in the traffic, either as a wholesale or retail dealer; and the question is whether the ordinance contains a valid prohibition against the act charged. If it does, it matters not that it may contain other prohibitions which the city has not the power to impose. The ordinance, in that case, would be merely void pro tanto, and its partial invalidity would not affect the judgment against this petitioner. It is claimed upon the authority of Merced Co. v. Helm, 102 Cal. 159, 36 Pac. 399, that a municipal corporation cannot make a single act of selling or giving away intoxicants a crime. But that case has no bearing upon the proposition. That was a civil action to recover a license which was imposed, and could only be imposed, for the privilege of conducting the business; and it was there held, among other things, that a single sale was not carrying on the business in the sense of the license laws. It does not follow from this, however, that a single sale may not constitute a crime if the ordinance so provides, as this clearly does. And the power to pass such an ordinance is granted in the most sweeping terms in section 11 of article 11 of the constitution. It can only be invalidated by pointing out some general law of the state with which it is in conflict, and there is no such law. Counsel concedes that it is well settled that the governing power of a municipality may prohibit the traffic in liquor altogether, so long as the prohibition does not interfere with interstate commerce (Ex parte Christensen, 85 Cal. 208, 24 Pac. 747; Ex parte Campbell, 74 Cal. 20, 15 Pac. 318); but he seems to contend that there can be no such prohibition

of single sales. There is no ground, however, upon which this distinction can be maintained. The ordinance is valid if it does not conflict with some general law which makes an exception in favor of single sales. In Ex parte Campbell, supra, the court was careful to say that the case did not involve any question as to the right to sell liquor apart from the traffic, but it was not decided or intimated that a prohibition of single sales was beyond the power of the municipality. In this case —for the first time apparently—that question is directly involved, and we can only say that no law has been called to our attention with which the Berkeley ordinance conflicts.

Counsel claim that this ordinance, and similar ordinances in other cities, if enforced, would cripple a leading industry of the state, and that they are in conflict with the policy of certain laws of the state relating to viticulture. As to the general legislation of the state, it seems to manifest quite as much solicitude for the prevention of intemperance as for the encouragement of wine making; but, since it is conceded that the traffic in intoxicating liquors may be prohibited by local ordinance, the wine-making industry would not be greatly benefited by upholding the right of individuals not engaged in the traffic to sell or give away an occcasional bottle of wine. Another objection to the ordinance is that it prohibits the sale of liquors for chemical purposes. This may result in inconvenience, but we cannot see that it affects the validity of the ordinance. Still another objection to the ordinance is that it creates a favored class, viz. licensed druggists and physicians, who, by combining together, and complying with easy conditions, may carry on the traffic in intoxicating liquors to any extent; for, it is contended, the sale by druggists is not required to be for medicinal purposes, and, if a licensed druggist can only get a licensed physician to furnish the prescriptions, he may sell liquor to the sick and to the well alike. We do not think this argument needs a very serious treatment. Even a penal law would not be so construed as to sanction so manifest an evasion. The ordinance protects only sales in good faith upon regular prescriptions.

We think the ordinance is valid so far as it relates to the charge against the petitioner. As to other matters the case calls for no expression of opinion.

In conclusion we will briefly notice the final contention of petitioner, viz. that the complaint does not sufficiently charge the offense defined in the ordinance. The complaint simply charges that the petitioner sold, etc., without alleging that he was not a licensed druggist, etc. It is said that everything alleged might be true, yet the petitioner entirely innocent, and it is argued the complaint is, therefore, bad. But the rule of pleading, sustained by the weight of authority and of reason, does not support this conclusion. The best short statement of the law upon this point is contained in the opinion

Same—Sale of Liquor—Allegations in Complaint.

of Ellsworth, J., in State v. Miller, 24 Conn. 522, where he says: "The rule as everywhere laid down is that, after words of general prohibition, whatever comes in by way of proviso or exception need not be negatived by the pleader, but must be set up by the accused. In this view it is immaterial whether the proviso or exception be contained in the enacting clause or subsequent section, if it only follows a general prohibition." This statement of the law is sustained by the numerous cases cited in the brief of respondent in which the principle has been applied to laws and ordinances in all respects similar to the ordinance in question here. There are undoubtedly opposing authorities, but they are less numerous, and the decisions are, we think, less satisfactorily reasoned, than those which sustain the rule as laid down by Judge Ellsworth. In our own state there is one reported case in which this question was necessarily involved, and where, without discussion, the rule as above stated was assumed as the basis of the decision. Ex parte Bird, 19 Cal. 130. Where the exception is so connected with the prohibition as to be a part of the definition of the offense, there the rule of pleading is different, and according to all the authorities it must be negatived by the pleader. An instance of this sort is a statute making it penal to carry on a business without a license. In laying a charge under such a statute, where the want of license is the gist of the offense, the want of license must be alleged. People v. Boo Doo Hung, 122 Cal. 806, 55 Pac. 402. Here, on the contrary, the offense consists in selling the liquor, and, if the person accused is one of those in whose favor an exception is made, he must allege and prove the fact as matter of defense. We think the complaint was sufficient, and the petitioner is remanded.

I concur: Van Dyke, J.

I concur in the judgment: Garoutte, J.

McFarland, J. I concur in the judgment and in the opinion of the Chief Justice. I concur in all that part of the opinion which deals with the existence of the justice's court because I think it right; and I concur in all the rest of the opinion because I think that the validity of the ordinance in question, so far as it deals with the sale of wines, etc., has been finally determined by former decisions of this court, from which I dissented. See Ex parte Campbell, 74 Cal. 20, 15 Pac. 318, and Ex parte Christensen, 85 Cal. 208, 24 Pac. 747. I desire to notice, however, that the charge against the petitioner was that he had unlawfully, etc., "sold and given away" certain named liquors. The offense charged, therefore, necessarily included a sale. But the ordinance, going further than the notion of business or traffic, provides that it shall be a misdemeanor for "any person" within the limits of the town of Berkeley "to give away" any "vinous, malt, or spirituous

liquors." So that by the terms of this ordinance it would be a public offense punishable by imprisonment for any person in Berkeley, in his own home, and at his own table or fireside, to offer a glass of wine or beer to a guest; and I desire to say that when a petitioner convicted of this time-honored hospitality shall come here for relief I will not feel myself precluded from again inquiring whether or not a personal right guarantied by the constitution has been violated.

Temple, J. (dissenting). Soon after this case was submitted, I prepared the annexed opinion, and a judgment discharging petitioner from custody. To that opinion I still adhere, notwithstanding the reasoning of the Chief Justice. I do not agree with the criticisms upon Miner v. Justice's Court of the Town of Berkeley. The counsel who appeared in that case, with one exception, appear also in this, and all points were then made in favor of the existence of the justice's court which are made here, so far as they then could have been made. The bearing which the new legislation would have upon the matter was, of course, not then considered. The questions discussed in the opinion were the only ones then thought material. The new proposition now made would, at the most, have been only an additional argument against the position then taken by the court. But, in my judgment, there is no force in the argument now made. The joint resolution of the legislature approving the freeholders' charter is not evidence of the population of the town of Berkeley of the most solemn and conclusive character, or at all. No authority is cited in support of this proposition, and I venture the assertion that none exists. In Stevenson v. Colgan, 91 Cal. 649, 27 Pac. 1089, 14 L. R. A. 459, the rule upon an analogous question was stated thus: "When the right to enact a law depends upon the existence of facts, it is the duty of the legislature before passing the bill, and of the governor before approving it, to become satisfied in some appropriate way that the facts exist; and no authority is conferred upon the courts to hear evidence and determine as a question of fact whether these co-ordinate departments of the government have properly discharged such duty." The legislative determination is conclusive upon the courts, so far as the validity of the law depends upon the existence of the facts; and accordingly it was held that in passing upon the validity of a law the court must confine itself to the facts apparent upon the face of the statute. Except as to what have been called "public facts," —such as the existence of a state of war, or martial law, or public disorder, or of certain political facts,—the cases do not go further. Luther v. Borden, 7 How. 1, 12 L. Ed. 581. And I repeat the conclusiveness of the supposed legislative finding only obtains as to the question of the validity of the law. Here the question to be passed upon was not whether the town contained 10,000 inhabitants, but whether it contained 3,500. Only so far would it be binding upon parties if it were a judg-

ment of a court. To that extent only could the adjudication go.

The principal opinion also relies upon the special census taken under the amendment of the classification act, which amendment was made in 1899. I have shown—at least to my own satisfaction—that this amendment does not apply to any city or town which could not effect a change of its organization from one class to another; and, further, that after the census has been taken the city does not enter the new class until the reorganization has been accomplished. It was held by Mr. Justice Henshaw that such was the case even under the classification act of 1883. In re Mitchell, 120 Cal. 384, 52 Pac. 799. Section 103 of the Code of Civil Procedure does not provide that cities having a population of 10,000 and not more than 20,000 shall have a justice of the peace. If this special census was lawfully taken (which I deny), Berkeley did not become a city of the fourth class. Section 103 therefore does not apply to it. Berkeley did not enter a new class in the mode provided.

It is said that when the first classification act was passed it was intended to include and apply to all municipalities. For one I concede this. There were then no freeholder charters, and but one city could have formed a charter under the constitution as first adopted; and the legislature could amend or change all municipal charters by general laws. It was held that such general laws were laws in regard to the organization of municipalities. City of Los Angeles v. Teed, 112 Cal. 319, 44 Pac. 580; City of Pasadena v. Stimson, 91 Cal. 249, 27 Pac. 604. Since then the constitution has been amended, and now general laws do not affect any cities or towns as to municipal affairs. There can be then no possible purpose for a classification under the constitution except as to cities and towns formed under the municipal corporation act. The classification for this purpose does not make the reference to the classes for other purposes general laws. Such laws will be special unless justified for other reasons than the reference to such classes. This was elaborately shown by the chief justice in Dougherty v. Austin, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161. I perceive no effort in the principal opinion to answer the objection that section 103, as amended, is a special law, if it applies to the town of Berkeley. In that respect it is the precise case considered in Miner v. Justice's Court.

We concur: Henshaw, J.; Harrison, J.

"Temple, J. The petitioner is held in custody for a violation of an ordinance of the town of Berkeley upon a judgment before Robert Edgar, who claimed to be, and acted as, a justice of the peace of the town of Berkeley. The petitioner contends: (1) That under the laws and constitution of the state there is no justice court in the town of Berkeley, and

therefore Edgar was not a justice of the peace; (2) the ordinance under which the conviction was had is void, because repugnant to general laws of the state, and also to the state and federal constitutions; and (3) the complaint upon which he was prosecuted does not show that he has violated the ordinance.

"It was decided by this court in Miner v. Justice Court, 121 Cal. 264, 53 Pac. 795, that there was no justice court in the town of Berkeley. It was said that the effect of the freeholders' charter, adopted in 1895, was to abolish the provision for a justice court in the former special charter, and that the provision made in the freeholders' charter for a justice court was ineffectual. It was also held that an act passed in 1895, purporting to create a justice court in the town of Berkeley, was void, because it was special and local legislation. In 1899 the legislature passed two acts, which, it is contended, together had the effect of providing a justice court for the town of Berkeley. One was an act to amend the classification acts of 1883. St. 1899, p. 141. It authorized a special census of the inhabitants of any city or town, and provided that if, from such census, it should appear that the number of inhabitants would entitle the municipality 'to reorganize under a higher or lower class,' proceedings could be inaugurated to that end, and for the election of the officers required for the class to which it was changed, and that upon the qualification of such officers the corporation shall belong to such class. Then follow the provisions which throw doubt upon the purpose and effect of the amendment. They are: 'Whenever the result of such enumeration shall have been declared by the council, board of trustees or other governing body, and entered in the minutes of such body, thereupon the number of such inhabitants so ascertained shall be deemed the number of the inhabitants of such city for all the purposes of this act, and for the purposes of legislation affecting municipalities. The clerk of the council, board of trustees, or other governing body of such city, shall cause a certified copy of such minute order to be filed with the board of supervisors of the county wherein such city is situated.' Counsel differ radically as to the effect of these two sentences. The petitioner contends that the census does not of itself change the class of the city, but only serves the purpose of the act, which is to enable the city or town to reorganize, and enter another class. The respondent argues that, as soon as the census return is entered in the minutes, the city enters a new class, and is thenceforth in the class indicated by the census return. But the presumptions are all against this construction. The purposes of the classification required by the constitution are for the incorporation and organization of cities and towns only. In regard to laws not for such purposes the classification is not one made by the constitution, in regard to which legislation may be had without incurring the risk that such legislation may be special or

local. No doubt the classes might be referred to in legislation as conveniently indicating the subjects of legislation; but when so referred to in statutes in regard to other matters than the incorporation and organization of cities and towns the legislation must be general, or the failure to include all must be justified by intrinsic differences. Rauer v. Williams, 118 Cal. 402, 50 Pac. 691. Whatever plausibility there was formerly in contending that the classification could apply to cities and towns other than those organized under the general municipal incorporation act, there is none since the constitutional amendments of 1896, which deny to the legislature the power to control the charters of cities and towns as to municipal affairs. Whatever meaning may ultimately be given to the phrase 'municipal affairs,' I have no doubt it will include all matters pertaining to the incorporation and organization of such cities and towns. It is not to be presumed that these cities and towns are to be classified whose organization cannot be controlled or affected by the legislature. Apparently now no such legislation is possible save as to cities and towns organized under the general incorporation act, and that must be by amending the general municipal incorporation act. The legislature could not have intended that the mere taking of the census should of itself raise the city to another class. The impracticability of this is shown in Rauer v. Williams, supra, and the proposition is amplified by Mr. Justice Henshaw in his concurring opinion. In re Mitchell, 120 Cal. 384, 52 Pac. 799. This proposition may be said to be the basis of that decision. In view of this construction we are not at liberty to suppose that it was intended that the town of Berkeley should, by merely entering the return of the enumeration, pass to another class of cities. Having a freeholders' charter, there would be nothing accomplished by such classification. The number of the inhabitants so ascertained may be deemed the number of the inhabitants for the purposes of legislation without changing the classification of the town,—supposing it to be a town which could be included in the classification. As we have seen, except for purposes of incorporation and organization, cities and towns may as well be referred to as containing a stated number of inhabitants as by referring to the classes.

"The other statute referred to, passed in 1899, consists in an amendment to section 103, Code Civ. Proc. The former section, for the purpose of providing for justices of the peace in some cities, made a classification of cities having 10,000 and not more than 20,000 inhabitants, and cities having 20,000 inhabitants and not more than 100,000. The new section provides justices of the peace for cities of the second, third, and fourth classes, but excepts from its operation cities and towns organized under the general municipal incorporation act. Berkeley is a city of the fifth class, and no justice of the peace is provided for cities of that class in section 103 as amended.

It is contended that by virtue of the special census, and the return thereof, Berkeley became a city of the fourth class, for which class of cities a justice of the peace is provided in the amended section. Berkeley was not reorganized under the act so as thus to become a city of the fourth class, and, having a freeholders' charter, it cannot be. It has, therefore, not become a city of the fourth class, and under the decision in Miner v. Justice's Court, supra, it still has no city justice of the peace.

"It is further contended by the respondent that the city of Berkeley has a justice court by virtue of the constitution, irrespective of the legislative action or nonaction. This contention is based solely upon the proposition that section 1, art. 6, declares that the judicial power of the state shall be vested in certain named courts, in which are included justices of the peace; and section 11 of the same article provides that the legislature shall determine the number of justices of the peace to be elected in townships, incorporated cities, and towns, and shall fix by law their powers, duties, and responsibilities. At the best this but declares that it is the duty of the legislature to provide such courts, but the constitutional provision cannot be self-operative. In the absence of legislation, the justices cannot be elected; and, if they could be elected, they would have no duties or powers.

"I conclude that there is no city justice of the peace for Berkeley, and that the petitioner is illegally held."

BLADES

v.

BOARD OF WATER COM'RS OF CITY OF DETROIT.

(*Supreme Court of Michigan, Dec. 21, 1899.*)

[81 Northwestern Reporter.]

Constitutionality of Legislative Act.—From a fair inference to be drawn from the title of the act of 1899, entitled "An act to transfer to the city of Detroit the title of all the property of every name and nature now owned, operated, and controlled by the board of water commissioners of the city of Detroit, under the power, rights and privileges granted said ward of water commissioners by an act entitled 'An act to amend the laws relative to supplying the city of Detroit with pure and wholesome water,' approved February 14, 1853, and the acts amendatory thereto, and to give said city the possession, control and operation and management of said property, and to repel all acts and parts of acts in conflict herewith," the object of said act is to transfer and give to the city the "possession, control and operation and management" of the water system, it already having title thereto under the act

Blades *v.* Board of Water Com'rs of Detroit

of 1853. The principal object, as expressed in the body of the act, is the change of the system of supporting the waterworks from that of water rates, as was provided in the act of 1853, to that of taxation of all taxable property, the water for domestic use being free, the expense thereof being paid by taxes, and the water used for other than domestic purposes being subject to water rates, which latter were to be added to the fund derived from taxation. *Held*, that the inclusion in the body of the act of the provision for changing the system of supporting such works is in contravention of Const. art. 4, § 20, which provides that "no law shall embrace more than one object, which shall be expressed in its title."

Legislative Taxation—Local Purposes.*—It is not within the power of the legislature to compel taxation of city property for local purposes, without the consent of the freemen of the city; hence the provisions, in the act of 1899, relating to the transfer to the city of Detroit of the possession and control of its waterworks, that the property of the inhabitants of said city shall be taxed for the support and maintenance of such waterworks, without submitting the question of such taxation to the freemen of said city or their representatives chosen for that purpose, are unconstitutional and void.

Act Construed—Effect.—The leading object of 1899, relating to the transfer to the city of Detroit of the possession, etc., of its waterworks, is the change in the system of maintaining and conducting such works, the provisions in relation to which are unconstitutional. *Held*, that where, upon the elimination from the act of such unconstitutional provisions, resort must be had to the old system, which it was the clear intention of the legislature to change, the whole act must fall.

Certiorari by relator to Wayne county circuit court. Affirmed.

Case Stated.

In 1853 an act was passed entitled "An act to amend the laws relative to supplying the city of Detroit with pure and wholesome water," which act was approved February 14, 1853. The present board of water commissioners of the city of Detroit was organized under this act, and has ever since conducted its affairs under such act and acts amendatory thereof. The material provisions of that act are read as follows:

"Section 1. The people of the state of Michigan enact, that Shubael Connt, Henry Ledyard, Edmund A. Brush, William R. Noyes, and James A. Van Dyke, be and they are hereby named and constituted as a board of water commissioners of the city of Detroit, who, and their successors in order shall be known by the name and style of the 'Board of Water Commissioners of the City of Detroit,' and by that name shall have power to contract, sue and be sued, to purchase, hold and convey personal and real estate, to have a common seal, to alter and change the same at pleasure, to make by-laws and ordinances, and do all legal acts which may be necessary and proper to carry out the effect, intent and object of this act.

*See note at end of case.

"Sec. 2. The said commissioners shall hold their offices respectively for the term of three, four, five, six and seven years from the first Tuesday in May, of the year one thousand eight hundred and fifty-three; said commissioners shall, within sixty days after the passage of this act, decide by lot their respective terms, which decision shall be notified by a written statement to the common council of said city, which shall be entered of record on the books of said common council; and at their first regular meeting in the month of April, in the year one thousand eight hundred and fifty-six, and annually thereafter, the said common council shall elect and appoint a citizen of said city, being a qualified voter and freeholder, as a commissioner, who shall hold his office for five years from the first Tuesday in May the next following: provided, that this section shall not be so construed as to disqualify any member of the said board for reappointment; and in case of the death or resignation, or removal from the city, of any of said commissioners, the common council shall, as soon thereafter as possible, appoint to fill such vacancy, for the remainder of the term, some citizen of said city, being a qualified voter and freeholder."

"Sec. 4. The said commissioners shall have power to loan, from time to time, upon the best terms they can make, after giving public notice by advertising in the city papers for sixty days, and in one paper in Boston, and two in New York, for such time as they shall deem expedient, a sum of money not exceeding two hundred and fifty thousand dollars, upon the credit of said city of Detroit, and shall have authority to issue bonds pledging the faith and credit of said city for the payment of the principal and interest of said bonds; which bonds shall issue under the seal of said board of commissioners, and shall be signed by them, or a majority of them, and bearing interest not exceeding eight per cent. per annum. And it shall be the duty of said commissioners to cause to be kept an accurate register of all the bonds issued by them, showing the number, date and amount of each bond, and to whom the same was issued; and it shall be their duty to cause to be furnished to the auditor of said city a copy of such register, as soon as the same is made, which shall be preserved by said auditor and copied into the records of said city.

"Section 5. It shall be the duty of said commissioners to examine and consider all matters relative to supplying the city of Detroit with a sufficient quantity of pure and wholesome water, to be taken from the Detroit river, or such other source as may be deemed expedient, for the use of its inhabitants.

"Sec. 6. Said commissioners shall have power to employ superintendents, clerks, collectors, assessors, engineers, surveyors, and such other persons as, in their opinion, may be necessary to enable them to perform their duties under this act, and to specify the duties of such persons so employed, and

to fix their compensation: provided, that in no case shall said commissioners receive, directly or indirectly, any compensation for their own services.

"Sec. 7. Said commissioners shall have power, and it is hereby made their duty, as soon as may be, after the necessary funds have been procured, as herein provided, to purchase such land and materials, and to construct such reservoirs, buildings, machinery and fixtures as shall be deemed necessary or desirable to furnish a full supply of water for public and private use in said city.

"Sec. 8. Said commissioners shall have power to construct reservoirs, jets and fire hydrants, at such localities in said city as they may deem expedient and necessary, and to lay pipes in and through all alleys and streets of said city; and also to construct in such localities as they may deem expedient, not exceeding one to each block, hydrants for public use, and to keep the same in repair; and also, with the consent of the common council of said city, to construct fountains in the public squares, or such other public grounds of said city as they shall deem expedient.

"Sec. 9. Said commissioners shall, from time to time, cause to be assessed the water rate to be paid by the owner or occupant of each house or other building having or using water, upon such basis as they deem equitable; and such water rate shall become a continuing lien, until paid, upon such house or other building, and upon the lot or lots upon which such house or other building is situated."

"Sec. 13. Whenever the receipts of said board, from water rates or other sources, shall accumulate so that there shall be a surplus, amounting to a sum of not less than five hundred dollars, not needed for the payment of the current expenses or the extension of said works, it shall be the duty of the commissioners, together with the auditor of said city, who shall be associated with them for that purpose, to invest the same in safe stocks, or upon other real or personal securities. Such investment shall be made in the name of said board, and in such manner as to make the same available for the payment of interest and principal of the bonds issued as aforesaid, as soon as may be. It shall be the duty of said commissioners to pay the interest on such bonds, and as fast as such surplus fund will permit, also the principal, as the bonds become due, as funds for such purpose shall from time to time accumulate. The said commissioners may, when they have funds for that purpose, purchase the bonds so issued as aforesaid, whether the same shall have become due or not; and in case the said commissioners shall at any time not have funds on hand sufficient to meet any of the said bonds at the time when they shall become due, they shall have the right to issue new bonds for such amount, and on such time as they shall deem expedient, in the place of bonds so becoming due as aforesaid; the said old bonds to be canceled in the registry thereof, and

the said new bonds to be recorded in the manner hereinbefore provided."

"Sec. 24. It shall be the duty of said commissioners, at least thirty days before the time fixed by the ordinance of said city for assessing city taxes, to make a special report to the common council of said city, what, if any, sum will be needed by said commissioners over and above the revenue of said board, to meet the payment of interest or principal of the bonds issued as aforesaid; and it shall be the duty of the common council to raise said amount by special tax in the same manner as general taxes, to be designated a water tax; and the said amount shall be paid over to said board by the treasurer of the said city."

"Sec. 26. All lands, lots, docks, buildings, machinery, pipes, logs, hydrants and all fixtures whatsoever, purchased, designated or used for the present waterworks of the city of Detroit, are hereby conveyed to and vested in said board of commissioners, who shall have full power to regulate, protect and control the same; and all the authority, rights and power heretofore exercised and had by said city over said works, are hereby continued to and vested in said board of commissioners."

By subsequent acts, the respondent was authorized to issue bonds for the purpose of extending and improving the waterworks. In 1873 a loan of a million dollars was authorized. Section 2 of that act reads as follows: "If the said commissioners shall, at any time, not have funds on hand sufficient to meet any of the said bonds at the time when they shall become due, they shall have the right to issue new bonds for such amount, and on such time, as they shall deem expedient, in the place of the bonds so becoming due as aforesaid, or such part thereof as said commissioners shall be unable then to pay; the said old bonds so taken up shall be canceled and such cancellation recorded or otherwise indicated in the registry thereof, and the said new bonds shall be recorded in the manner hereinbefore provided. It shall be the duty of the common council, and said council is hereby empowered, to cause to be levied and assessed annually, upon the taxable property in said city, the sum of seventy-five thousand dollars, the same to be included in each annual tax assessment levied on said city, and the same shall not require or be conditioned upon the vote of the freemen of said city. The said sum shall be collected the same as other general taxes, and shall, from time to time, as received, be paid over to said board by the treasurer of said city; and the moneys so paid over by said treasurer to said board shall be used and appropriated by said board, first, in payment of the interest of said bonds; second, if there be any surplus, after payment of the interest accruing during the year, said moneys shall be paid into and form a part of the sinking fund of said board, and used and appropriated to the payment of said bonds, when due, or to the purchase of the same, or of any

other of the bonds heretofore issued by said board, as the said board may, from time to time, think expedient."

In 1887 an act was passed by the legislature which authorized the respondent to accept a bequest made to it by Chauncey Hurlbut, who had been for many years the president of the board. The purpose of this loan was the removal of the water-works outside the territorial limits of the city of Detroit. The value of the property under the control of the commissioners January 1, 1899, was $6,030,963.29. Up to 1875 it had been supported by water rates alone. From that year to the present a general per annum tax has been levied, under the direction of the common council, under the section last above quoted, amounting to from about $18,000 to about $74,000.

In 1899 an act was passed entitled "An act to transfer to the city of Detroit the title to all the property of every name and nature now owned, operated and controlled by the board of water commissioners of the city of Detroit, under the powers, right and privileges granted said board of water commissioners by an act entitled 'An act to amend the laws relative to supplying the city of Detroit with pure and wholesome water,' approved February fourteenth, eighteen hundred fifty-three, and the acts amendatory thereto, and to give to said city of Detroit the possession, control and operation and management of said property, and to repeal all acts and parts of acts in conflict herewith."

Section 1 provides for the transfer of all the property, authority, rights, and powers of the board of water commissioners to the city of Detroit, and provides that the operation, extension, and improvement of the system shall be under the direction and supervision of the board of public works.

Section 2 provides for the laying of pipes, mains, etc., in the streets and through private property; defining the proceedings to be instituted for condemnation.

Section 3 provides for the purchase of lands, and the erection of buildings and machinery.

Section 4 provides for the assumption by the city of Detroit of the bonded and other indebtedness of the board of water commissioners, and also of all lawful contracts entered into by said board of commissioners, and for the prosecution of all suits then pending.

Section 5 provides for the erection of drinking hydrants for public use.

Section 6 provides for the erection of a separate department of the board of public works to be known as the "Water Department" thereof, and for the employment of superintendent, clerks, etc.; for the removal of the superintendent; for the classification of the work of the department, and the keeping of accounts. It also contains the following provisions: "It shall keep a separate account of the cost of laying distributing pipes, aqueducts and mains hereafter laid so that the cost thereof in each block may be ascertained at any time, and so

that, whenever a pipe or main larger than six inches in diameter is laid, the cost of laying the six-inch pipe in each block, had it been laid, may also be ascertained. The just proportion of the cost of laying said six-inch pipes shall be assessed to each lot benefited. Such just proportion shall be ascertained by finding the ratio which the narrowest frontage of said lot bears to the entire frontage on both sides of the street or alley in the block where said lot is located. The amount of such just proportion due from each lot when ascertained shall be assessed as a special assessment upon such lot. The common council shall provide by ordinance for the collection of all such special assessments. Lots already supplied with water shall not be subject to special assessment for water pipes hereafter laid. No lot shall be supplied with water from any pipe, main or aqueduct hereafter laid, without there is first paid to the city treasurer the just proportion of the cost of laying a six-inch pipe in the street or alley on which said lot abuts, with interest thereon from the time said pipe is laid. Such money when paid shall be credited to the water department construction fund."

Section 7 provides for the distribution of water outside the city.

Section 8 provides for a division of the revenues and moneys of the water department of the board of public works into separate funds.

Sections 9 and 10 are as follows:

"Sec. 9. It shall be the duty of the board of public works to transmit to the common council of the city of Detroit, on or before the fifteenth day of February in each year, an estimate of the amount of moneys necessary for improving and enlarging the pumping works and plant of the waterworks of the city of Detroit. Also an estimate of the amount of money said board may deem necessary to pay the cost of extending water mains and pipes, and for any other purpose essential to the proper maintenance and operation of the waterworks and water system of said city. Such estimates, or so much thereof as the common council shall approve, shall be submitted to the approval of the board of estimates, at the meeting thereof required by law, for the approval of annual taxes voted by said common council; and so much of said estimates as shall be approved by the board of estimates shall be placed upon the general assessment rolls, and shall be assessed, levied and collected the same as other city taxes. Said money, when collected, shall be paid into the city treasury and shall be credited to the construction fund of the water department. They shall also transmit to the common council, on or before the fifteenth day of February of each year, an estimate of the total amount of money they deem necessary to pay the cost of maintaining and operating the water plant for the ensuing fiscal year, which shall include all necessary repairs. Such estimate or so much thereof as the common

council and board of estimates shall approve, shall be levied and collected as hereafter provided. The board for fixing water rates as provided for in section ten of this act, shall prepare and transmit to the common council on or before the first day of May in each year an estimate of the amount of money they deem a just proportion of the total estimate for maintenance as a reasonable charge for the expense of furnishing water for domestic purposes to the inhabitants of the city of Detroit, such domestic purposes to include such use of water in and about places of residence as are usual for household purposes; and for water used for water-closets and wash-room facilities in all buildings used wholly or in part for other than residence or household purposes, to the city of Detroit, including its agencies, and municipal boards, the Detroit house of correction, the public schools and such charities as the common council shall have determined to exempt from the payment of water rates, which estimate shall be in detail, specifying the objects of such expenditure, the sums desired for each and the reasons therefor. It shall be the duty of the common council to cause to be levied and assessed upon the taxable property of the city, the sum so stipulated as contemplated in the preceding paragraph and the same shall not be submitted to the board of estimates or to a vote of the freemen of the city. When such tax is collected it shall be paid into the city treasury and credited to the water department maintenance fund. The balance of the total estimate for operating expenses shall be assessed as water rate to be paid by the owner or occupant of each house or other building having or using water, and against any persons using water, except for domestic purposes in the city of Detroit, upon such basis as they shall deem equitable; and such water rate shall become a continuing lien until paid, upon such house or other building, and upon the lot or lots upon which the house or other building is situated, and all such water rates, when collected, shall be paid into the city treasury and credited to the water department maintenance fund. Any surplus of moneys remaining in the maintenance fund at the end of any fiscal year shall be applied to and credited to the maintenance fund of the ensuing fiscal year, and shall be used for no other purpose. Any surplus of money remaining in the construction fund at the end of any fiscal year shall be applied to and credited to the construction fund of the ensuing fiscal year, and shall be used for no other purpose. On and after the first day of July, eighteen hundred ninety-nine, the water rates as heretofore levied and collected by the water commissioners shall continue to be levied and collected under the supervision of the board of public works until the first day of July, nineteen hundred, when said rates shall cease, and thereafter the water rates shall be assessed and collected as provided for in this act.

"Sec. 10. The superintendent of the water department, the mayor, the president of the board of public works, the city

comptroller and the city treasurer shall constitute a board for fixing water rates, which shall, on or before the first day of May of each year, fix a schedule of the water rates to be collected for the ensuing fiscal year, which schedule shall comply with the requirements of the preceding section. The water rates so fixed shall be collected by the receiver of taxes in such manner and at such times as shall be provided by an ordinance by the common council."

Section 11 provides for an annual report by the city comptroller of the financial condition of the water department, and provides for access to the books for that purpose.

Section 12 provides for a distribution of the revenue received from the house of correction, and that all the bonds mentioned and provided for in this act shall continue to be exempt from the charter provision limiting the bonded indebtedness of the city.

Section 13 provides a penalty for injuring any of the property of the waterworks.

The act contains no repealing clause.

The respondent refused to turn over to the relator the books, property, etc., under its control. Thereupon he applied to the circuit court for the county of Wayne for a writ of mandamus to compel such delivery. The case was there heard before four of the circuit judges, three of whom (Judges Carpenter, Lillibridge, and Hosmer) held the law to be void. The majority opinion held that the scheme of taxation provided in section 9 of the act is unconstitutional, because, in a matter purely local, the power of taxation was conferred upon a board appointed by the legislature, in which the taxpayers and freemen of the city were allowed no voice, either by direct vote or by those chosen to represent them for that purpose, and that this unconstitutional scheme was so interwoven with the entire frame of the act that the entire act must fall. In a concurring opinion filed by Judge Hosmer, he held that the object of the law was not expressed in its title, and that the act was, for this reason, void. Judge Waite dissented, and, while he held that certain provisions were unconstitutional, he also held that the waterworks might be carried on and maintained as heretofore, and that the balance of the act could stand, without the unconstitutional provisions.

Charles Flowers and Charles D. Joslyn, for plaintiff.

Fred A. Baker and Henry M. Duffield, for defendant.

Grant, C. J. The validity of the act of 1899 presents the sole question involved in this proceeding. Its validity is attacked upon numerous grounds. The only ones necessary to discuss and determine are involved in the following questions: (1) Is the object of the act expressed in its title, within section 20, art. 4, of the constitution, that "no law shall embrace more than one object, which shall be expressed in its

title"? (2) Is the scheme of taxation provided by the act valid? (3) If not valid, can the act stand with this provision stricken out?

1. The present board of water commissioners holds, and has possession of, this property as a trustee for the city. The city is the owner, just as effectually as though the deeds were made direct to it. Under the new act, the property is no more and no less the property of the city than it was under the old act. The legislature so understood; for section 1 declares the title to be conveyed to, and vested in, the city by virtue of the act. No deeds of conveyance or evidences of transfer from the board of water commissioners are required. The operation, extension, and improvement of the system, as provided in the act, are intrusted to the direction and supervision of the board of public works of said city, which is directed to have a separate department, to be known as the "Water Department of the Board of Public Works," with power to employ superintendent, clerks, etc., and to specify their duties, their compensation to be fixed by the common council. The administrative control and management is transferred from the water board to the board of public works, the principal difference between the authority of the former board and the latter being that the latter is more under the control of the common council than the former; in other words, the board of water commissioners can do certain acts without the consent of the common council, whereas the board of public works cannot do them without such consent. We are not prepared to hold that, looking into the body of the act, its sole object is to transfer the control and management of the waterworks to the board of public works. It is unnecessary to decide this question.

Constitutionality of Legislative Act.

It is pertinent here to determine what the object of the act is, as expressed in the title. It was not to transfer the title to the property to the city, for that the city already had. It was evidently to transfer and give to the city the "possession, control, operation, and management," which had theretofore been exercised by the board of public works. Does the title purport to contemplate a complete revision of the system by which the waterworks had been supported for nearly half a century, and the transfer of its management under rules and regulations radically different from those which had heretofore existed? If this were an original act to authorize the city to establish a water department, and to provide for the control, operation, and management thereof, such title would undoubtedly be sufficient, as is clearly shown in People v. Mahaney, 13 Mich. 495, and People v. Hurlbut, 24 Mich. 44. We have given the two acts almost in full, so that the difference may be readily seen. The purpose of this constitutional provision is that legislators, and as well parties interested, may understand from the title that only provisions

germane to the object therein expressed will be enacted. Would the title to this bill, as introduced in the legislature, when read by a taxpayer of Detroit, be notice to him that the system of supporting the waterworks was to be changed from that of water rates to that of taxation? Would it be notice to the manufacturers and the business men of Detroit that they were to pay water rates, while all the rest—a great majority—of the city, were exempt, and were to have free water, and that they were to be taxed to furnish free water to their neighbors? Clearly, no such object can be found in the title, which simply authorizes the transfer from one department of the city government to another, and gives to the transferee the possession, control, operation, and management thereof. Obviously, it would not naturally be inferred that the legislature, under such a title, intended to make the radical changes provided for in the body of this act. What is there to indicate an intention to virtually abolish the water-rate system, and substitute taxation in its stead? or to provide free water to the inhabitants of the city? or to give water to private individuals, and charge its cost to the taxpayers? As is well stated by Judge Hosmer in his opinion, there is "no natural connection between the title of the act and the extraordinary provisions for raising the means necessary to defray these different expenses." What we said in Grosvenor v. Duffy (Mich.), 80 N. W. 19, is equally applicable here. See, also, Ryerson v. Utley, 16 Mich. 269. The fair inference to be drawn from this title is that the object is to take away the possession of the waterworks, and its control and management, from the board of water commissioners, and transfer them to the city, and that the body of the act would contain only such provisions as were essential to accomplish that object.

2. The method provided by this act for the support and maintenance of the waterworks is unconstitutional and void. While the provisions of the act are somewhat incongruous, it is apparent that it imposes compulsory taxation for purely local purposes. The board established by section 10, to fix water rates, is also, by section 9, directed to prepare and transfer to the common council an estimate of the amount they deem a just proportion of the total estimate for maintenance as a reasonable charge for furnishing water for domestic and other purposes therein specified. It is then made the duty of the common council to levy and assess upon the taxable property of the city the sum so fixed, and that it shall not be submitted to the board of estimates or to a vote of the freemen of the city. The furnishing of water to the city and its inhabitants is a purely local matter, and it is not within the power of the legislature to compel taxation for that purpose, without the action of the freemen of the city or their chosen representatives. This question was fully and ably discussed in People v. Common Council of

Legislative Taxation—Local Purposes.

Detroit, 28 Mich. 228, which is the leading case in this state upon the subject. In an exhaustive opinion by Justice Cooley, where the attempt was made by the legislature to impose compulsory taxation for the maintenance of a park, he closes his discussion with the following pertinent language: "No precedent entitled to respect can justify such a change of powers; for, from the very dawn of our liberties, the principle most unquestionable of all has been this: that the people shall vote the taxes they are to pay, or be permitted to choose representatives for the purpose." In a concurring opinion, Justice Campbell said: "From time immemorial, every municipal government, properly so-called, and acting within its peculiar sphere, has acted through its common council, composed either of the burgesses or their representatives, subject in some cases to checks and vetoes, but not subject to legislation or final action in defiance of their own decisions. Their supremacy cannot be given up by themselves any more than it can be taken from them. No doubt the state can limit their powers, but it cannot transfer them." The question is there so thoroughly discussed that we deem it unnecessary to further consider the question. See, also, Commissioners of Parks & Boulevards of Detroit v. Common Council of Detroit, 80 Mich. 663, 45 N. W. 508.

The judges below all agree that the provision contained in section 6 for assessing the cost of laying a six-inch pipe in front of each lot was void, and in this opinion we concur.

3. The body of this act provides a complete revision and change in the system of maintaining and conducting the waterworks. The leading feature in it is the change from maintaining it by water rates to that of taxation and free water. Nearly all its provisions are in conflict with the act of 1853. The leading feature in the body of the act is not the transfer from one department to another, but the complete change in the system. It cannot be said that the legislature intended simply to transfer the property, control, and management, and not to impose upon the new body the provisions incorporated for such management and the method for raising the necessary funds to sustain and carry it on. This would require the courts to say that the legislature intended to retain the old system, if the new one could not prevail. This would amount to judicial legislation, and compel us to legislate into the act that which it did not contain. With these provisions eliminated, resort must be had to the old system of water rates, which it was the clear intention of this act to substantially eliminate. The unconstitutionality of these provisions renders the whole act void. See Quinlon v. Rogers, 12 Mich. 168; Campau v. City of Detroit, 14 Mich. 257; Warren v. Mayor, etc., 2 Gray, 99; Jones v. Robbins, 8 Gray, 339; Slauson v. City of Racine, 13 Wis. 398. The judgment is affirmed. The other justices concurred.

Act Construed—Effect.

Note

Legislative Interference with Matters Purely Local.—Says the court, in Board of Park Com'rs *v.* Common Council of Detroit, 28 Mich. 240, by COOLEY, J., "Whoever insists upon the right of the state to interfere and control by compulsory legislation the action of the local constituency in matters exclusively of local concern, should be prepared to defend a like interference in the action of private corporations and of natural persons. It is as easy to justify on principle, a law which permits the rest of the community to dictate to an individual what he shall eat, and what he shall drink, and what he shall wear, as to show any constitutional basis for one under which the people of other parts of the state, through their representatives, dictate to the city of Detroit what fountains shall be erected at its expense for the use of its citizens, or at what cost it shall purchase, and how it shall improve and embellish a park or boulevard for the recreation and enjoyment of its citizens. The one law would rest upon the same fallacy as the other, and the reasons for opposing and contesting it would be the same in each case, and while it may be entirely possible that in any particular instance the interference would be beneficial to the person or the community whose rights are invaded, it is not to be overlooked that an interference to compel a person to submit to something for his own good, may be made use of as a precedent to compel him at some future time to submit to extortion and plunder. The law very properly draws a line between that which is admissible and that which is not, and it does not allow outside dictation in matters purely of local concern, for one very good reason, among others equally good, that the motive for outside interference will very likely be something besides a desire to do good to a community in which the parties interfering have no personal interest, unless of a merely sentimental nature, and whose burdens they are not to share, or enjoyments participate in. All such matters are left to those whose interests will prompt them to act with prudence, and who, because of their interest, and because they relate to matters that must come under their own view and observation, they are presumptively best qualified to decide upon." Quoted and approved in Helena Consol. Water Co. *v.* Steele, 20 Mont. 1, 49 Pac. Rep. 382, in which case it was held that an act of the legislature allowing the city of Helena to supply its citizens with water only on condition it should purchase the plant of the persons then supplying the city with water, unconstitutional.

In People *ex rel.* McCagg *et al. v.* Mayor, etc., of Chicago, 51 Ill. 17, 2 Am. Rep. 278, the facts were precisely the same as those in Board of Park Com'rs *v.* Detroit (*supra*); *viz.*: The legislature provided for the establishment of a public park for the city of Chicago, and provided that the city should pay for the same with its bonds. The court in holding such act unconstitutional says: "While it is conceded that municipal corporations, which exist only for public purposes, are subject at all times to the control of the legislature creating them, and have, in their franchises, no vested right, and whose powers and privileges the creating power may alter, modify or abolish at pleasure, as they are but parts of the machinery employed to carry on the affairs of the state, over which, and their rights and effects, the state may exercise a general superintendence and control, we are not of opinion that power, such as it is, can be so used as to compel any one of our many cities to issue its

Note

bonds against its will, to erect a park or for any other improvement—to force it to create a debt of millions—in effect, to compel every property owner in the city to give his bond to pay a debt thus forced upon the city. It will hardly be contended, that the legislature can compel a holder of property in Chicago to execute his individual bond as security for the payment of a debt so ordered to be contracted. A city is made up of individuals owning the property within its limits, the lots and blocks which compose it, and the structures which adorn them. What would be the universal judgment, should the legislature, *sua sponte*, project magnificent and costly structures within one of our cities—triumphal arches, splendid columns, and perpetual fountains—and require, in the act creating them, that every owner of property within the city limits should give his individual obligation for his proportion of the cost, and impose such costs as a lien upon his property forever? What would be the public judgment of such an act, and wherein would it differ from the act under consideration?"

In Baltimore *v.* Reitz, 50 Md. 574, such an act for such a purpose was held valid.

In Perkins *v.* Slack, 86 Pa. St. 270, it was held that an act vesting in a commission the right to contract for the building of a city hall to accommodate the municipal courts of the city of Philadelphia and to require the common council of the city to levy special taxes for the payment of same, was held constitutional. This case is severely criticised by JUDGE DILLON (Dillon's Munc. Corp. 4th Ed., page 129), who holds that the building of a city hall of such a character belongs to the category of local or municipal, as distinguished from state or public, objects.

Says the court in Allor *v.* Wayne County Auditors, 43 Mich. 98, "No business which is in its nature municipal can be controlled by state or any other outside authorities."

Appointments by the legislature, for offices that are purely local and municipal, cannot be made without the assent of the local people or authorities. Atty. Gen. *v.* Lathrop, 24 Mich. 235.

The legislature has no power to make permanent appointments for offices of a purely local nature. People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

Says the court in People *v.* Lynch, 51 Cal. 15, 21 Am. Rep. 68, "The inhabitants of a city cannot be deprived of their right to have such matters as are placed by the charter under the supervision and control of the legislative department of the city government, passed upon by their representatives in the city council. The legislature cannot, in a special case, deny to the proper city authorities that discretion which they may ordinarily employ with respect to local improvements."

A mandatory statute compelling a town or other municipal corporation to become a stockholder in a railroad or other corporation by exchanging its bonds for stock upon the terms prescribed by the statute, without its consent in any way given, is constitutional. People *ex rel.* Dunkirk, etc., R. Co. *v.* Batchelor, 53 N. Y. 128, 13 Am. Rep. 480.

In re Prospect Park, 60 N. Y. 398, it was held, that the legislature had no right to compel a town to contribute to the payment of a debt of an adjoining city.

CITY OF DENVER

v.

HYATT.

(*Supreme Court of Colorado, Dec. 17, 1900.*)

[63 Pac. Rep. 403.]

Defective Sidewalk—Demurrer to Complaint—Failure to Aver Notice.*—A complaint in an action against a city for injuries caused by defective sidewalk is not demurrable because it fails to aver that the city had notice of the defect, where the complaint shows that the defect was plainly visible, and that it had existed for two months prior to the accident, which was ample time within which the city should have discovered the defect and repaired it.

Admissibility of Evidence—Contributory Negligence.—Evidence for plaintiff that there was no light at the intersection of streets adjacent to the place of the accident was properly admitted on the issue of contributory negligence, in an action against a city for injuries caused by defective sidewalk, where it was shown that the accident occurred at night.

Instructions—Exceptions.—Trial courts should require counsel to specify alleged errors in instructions given, when exceptions are taken; but where this is not required, and the instructions are paragraphed, a mere exception to each instruction separately is sufficient, if allowed in that form.

Same—Harmless Error.—An instruction in an action against a city for injuries caused by defective sidewalk which stated, in substance, that notice of the defect, only, would be ample to establish negligence on the part of the city, was harmless, where the undisputed evidence showed that the defect was plainly visible and had existed for from a month to a year and a half prior to the accident.

Same—Question of Damages.—The undisputed evidence showed that plaintiff was wholly incapacitated for work from the time of the accident to the time of the trial; that, from her then physical condition, it was probable that she would be prevented from following her occupation for some time to come; and that her ability in that respect might be more or less impaired in the future. The instructions given stated that, in estimating her damages, her loss of time resulting from the injury, and also loss of time which it appeared she would be compelled to sustain in the future, as well as her impaired earning ability in consequence of such injury, both past and future, should be considered, and that her loss of capacity to perform the duties of her occupation, and the earnings which she lost in consequence thereof, were proper elements to consider in estimating the damages. *Held*, that the instructions, when considered in connection with the evidence, did not authorize the recovery of

*See notes at end of case.

damages for both loss of time and impaired earning ability covering the same period.

Same—Harmless Error.—In an action against a city for injuries received, it was not error to instruct to the effect that, if plaintiff was predisposed to a disease which was aggravated by reason of the accident, she was entitled to recover damages necessarily resulting from such aggravation, where there was evidence that shortly after the accident, and down to the time of the trial, she suffered serious pains, supposed to have been caused by disease of her internal organs.

Same—Same.—An instruction, on the question of damages for personal injuries, that the jury should consider, "both in the determination of their verdict and in estimating the amount of plaintiff's damages," any predisposition to disease aggravated by the injury, if such appear to be the fact, is not open to the objection that it authorizes the jury to base their verdict on such fact, instead of the negligence of defendant.

Evidence—Sufficiency.—The evidence in an action for injuries from a fall caused by a defective sidewalk showed that plaintiff, a nurse, was a healthy, vigorous woman prior to the accident. At the time of the trial she was suffering from a deranged condition of her internal organs, which rendered her practically helpless, which condition was manifest for the first time shortly after the accident. What particular organs were affected was not shown. One witness testified that her condition was caused by the fall. None of the others stated directly that it was not, but they stated that they had never known such condition due to an accident of that kind, and that her condition was not necessarily caused thereby. *Held* sufficient to sustain a finding that her internal injuries were caused by the accident.

Negligence—Question for Jury.—The question whether a city was negligent in failing to repair a defective sidewalk was properly left to the jury, where the defect was an opening 20 inches long and about 4 inches wide, and had existed for from a month to a year and a half prior to the accident.

"Jury Act"—Constitutionality.—The jury act of 1899 (page 244), permitting a verdict in a civil case to be returned by three-fourths of the number of jurors sitting in the case, is repugnant to the state constitution (section 23), providing that "a jury in civil cases in all courts may consist of less than twelve men, as may be prescribed by law," which impliedly limits the legislature to the one act of providing for a jury of less than 12, thus preserving the essential feature of unanimity in the rendition of a verdict, as established by the common law.

Appeal from district court, Arapahoe county.

Action by Minnie L. Hyatt against the city of Denver. From a judgment for plaintiff, defendant appeals. Reversed.

This action was commenced by appellee, as plaintiff, to recover from appellant, as defendant, damages for a sprain of her right ankle and back, impairment of her sight, and severe internal injuries, resulting, as it is alleged, from a fall caused by a defective sidewalk. From a verdict in her favor the city appeals. Regarding the time

Case Stated.

and place of accident, and the period for which the defect in the sidewalk existed, the complaint, inter alia, alleged "that on or about the 2d day of May, 1899, and for more than two months next prior thereto, there existed in said sidewalk, along the northeast side of said Twenty-Eighth street, * * * an open, unprotected, and dangerous hole, about twenty inches in length and four inches in width." To this complaint the city filed a general demurrer, which was overruled. The accident occurred at night. Plaintiff stepped into the hole in the sidewalk in such way that her foot became fastened, which caused her to fall. She testified that at the time of the accident there was no light at the intersection of the streets adjacent to the point where the accident occurred. At the instance of the plaintiff, as appears from instructions numbered 14 to 19, both inclusive, the court instructed the jury, in substance, that a failure on the part of the authorities of the city to exercise reasonable care to keep its sidewalks in a reasonably safe condition for travel was negligence, which would render it liable for damages to any person who, in the exercise of ordinary care and diligence, and without fault on his part, was injured by reason of a defect in the sidewalk of which the authorities had notice, or which had existed for so long a time previous to the injury that they, in the exercise of reasonable care, should have taken notice of such defect, and therefore if it should appear from the evidence that plaintiff, without fault or negligence on her part, received the injuries for which she sued by reason of such a defect in the sidewalk as rendered it dangerous for travel, she would be entitled to a verdict, provided the city had notice of such defect in either of the ways above mentioned; that if it appeared from the evidence that she had a latent disease of any of her abdominal organs, which would not have been made manifest except for the injury sustained by the accident, and that such disease was aggravated by the alleged injury, it was proper to take these matters into consideration in determining the verdict and estimating her damages; that, if the issues were found for plaintiff, she was entitled to recover such damages as would fully compensate her for the injuries sustained, and which she would sustain in the future; that, in estimating her damages, her loss of time, if any, resulting from the injury, and also loss of time which from the evidence, it appears she will be compelled to sustain in the future, as well as her impaired ability to earn money in consequence of such injuries, both past and future, should be taken into consideration; and that her loss of capacity to perform her duties as nurse, and the earnings which she lost in consequence thereof, are proper elements to consider in estimating the amount of damages to be awarded. The exceptions to these instructions are in the following language: "To the giving of instructions requested by counsel for the plaintiff, * * * and to each and every of said instructions, the defendant, by his counsel, then and

there duly and severally objected and excepted." The verdict was in the sum of $5,000, which, it is urged, is excessive. The immediate result of the accident was a sprained ankle and a bruised back. She also claimed at the time of the trial that the condition of certain abdominal organs was attributable to the accident. This condition did not exist prior to the accident, but was manifest shortly afterwards. The evidence of the physicians was to the effect that they could not say positively how or what internal organs were affected; that an exploratory incision would be necessary to ascertain what the trouble was, and even that might not disclose it. One physician testified that, in his opinion, her condition internally was caused by the fall. Another physician stated that all of her symptoms, excluding the sprained ankle and back, could be traced to other causes than a fall. Another physician, appointed by the court, gave it as his opinion that plaintiff was suffering from a diseased condition of internal organs, the exact nature of which he could not determine, and that he had never known such a condition as she presented due to an accident; while another physician, also appointed by the court, stated that he was not able to locate her internal injuries to a certainty, and that her present condition was not necessarily attributable to the fall. Prior to the accident she was an active and healthy woman. At the close of the testimony the city requested the following instruction, which was refused: "The jury are instructed that, for want of sufficient evidence of negligence on the part of the defendant city with respect to the alleged defect in the sidewalk, the law of this case is with the defendant, and the verdict should be for the defendant." The evidence regarding the defect in the sidewalk was to the effect that it was caused by the breaking off or decay of a portion of one of the planks of which it was constructed, lying crossways; that the opening thus made was about 20 inches in length and about 3 inches in width. The verdict returned was agreed to by only three-fourths of the number of jurors to whom the cause was submitted. The law which authorizes a verdict so to be returned is as follows: "Section 1. That hereafter, in all civil cases in courts of record which shall be tried by a jury, not less than three-fourths of the number of jurors sitting in such case may concur in and return a verdict therein, and such verdict shall have the same force and effect as though found and returned by all of the jurors sitting in said case. * * *" Laws 1899, p. 244. Section 23, Bill of Rights, provides: "The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve men, as may be prescribed by law. * * *" The errors assigned will be considered under the following heads: (1) The overruling of the demurrer to the complaint; (2) the introduction of testimony; (3) instructions given; (4) sufficiency of evidence to

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sustain the verdict; (5) instructions refused; (6) constitutionality of the act permitting a verdict to be returned by three-fourths of the number of jurors sitting in a case.

J. M. Ellis, City Atty., S. L. Carpenter, Asst. City Atty., and N. B. Bachtell, Asst, City Atty., for appellant.

Ben B. Lindsey and Fred W. Parks, amici curiæ.

Charles H. Toll, D. V. Burns, and C. M. Gorwood, for appellee.

Gabbert, J. (after stating the facts). 1. In support of the demurrer to the complaint, it is urged that the latter is insufficient, for the reason that it contained no averment that the city had notice of the condition of the sidewalk at the place where the accident occurred. Notice of such a defect may be either actual or constructive. If the defect, such as is alleged in this case, exists for a sufficient length of time before the happening of an accident therefrom, so that, in the exercise of ordinary diligence by its proper officials, the existence of such defect could have been ascertained by the city, it is presumed in law to have that notice of the defect which is termed "constructive." City of Denver v. Dean, 10 Colo. 375, 16 Pac. 30; Todd v. City of Troy, 61 N. Y. 506; City of Boulder v. Niles, 9 Colo. 415, 12 Pac. 632. The defect alleged to exist in the sidewalk in question was not latent. On the contrary, it was visible. It is charged that it existed for more than two months next prior to the date of the accident of which plaintiff complains. Certainly that was ample time within which the city, through its proper officers, should have discovered the defect and repaired it. The demurrer to the complaint was properly overruled.

Defective Sidewalk—Demurrer to Complaint—Failure to Aver Notice.

2. The accident to plaintiff occurred in the nighttime. In order to entitle her to recover, she must have been in the exercise of due care upon her part. For this reason it was competent for her to show there was no light at the intersection of the streets adjacent to the defective sidewalk, for the purpose of showing the surrounding conditions at that time. Had the light been sufficient to render the defect visible, she might have been guilty of contributory negligence, had she not avoided it. If, on the contrary, it was not visible because of the darkness, it was proper to show this fact, so that the jury might judge of the degree of care which she exercised.

Admissibility of Evidence—Contributory Negligence.

3. Counsel for appellee contend that the character of the exceptions to the instructions which we are asked to review is such that they should not be considered. The instructions were paragraphed. The object of an exception is to invite the attention of the trial judge to an alleged error in an instruction to which it is directed, and where, as in this case, the exception is to each

Instructions—Exceptions.

instruction separately, it is sufficient. Ritchey v. People, 23 Colo. 314, 47 Pac. 272, 384. We have had occasion more than once to criticise exceptions of this character, but, under the practice which has become fixed by repeated decisions, it appears that they are sufficient if allowed in that form. The trial judge ought to be given an opportunity to review and correct an instruction, if found to be erroneous. A mere exception, while it challenges the correctness of an instruction, does not point out specifically wherein it is incorrect; so that, in justice to the trial judge, for the purpose of giving him an opportunity to correct erroneous instructions, and thus prevent the mischief caused thereby, trial courts, in allowing exceptions to instructions, should require counsel, at the time of taking them, to briefly point out wherein they are erroneous.

The first objection urged by counsel for appellant to the instructions given is that they omitted to state that the defect must have existed such a length of time before the happening of the injury as would give the officers of the municipality sufficient time, by the exercise of ordinary diligence, to repair it; or, stated in substance, that notice of this defect only would be ample to establish that it was guilty of negligence. Mere notice on the part of the city of the existence of the defect in the sidewalk would not be sufficient to render it liable. Its failure to exercise reasonable diligence in repairing such defect after knowledge of its existence would constitute the negligence which would make it responsible. City of Denver v. Dean, supra; Todd v. City of Troy, supra. Were it not for the undisputed evidence on the question as to length of time this defect existed before the accident to plaintiff, the instructions complained of would be serious error. We find, however, from an examination of the record, that all the witnesses who testified on this subject state positively that the defect had existed for from one month to a year and a half prior to that date; that it was plainly visible. It appears, therefore, that the city not only was bound to take notice of this defective sidewalk, but that, in the exercise of ordinary diligence upon its part, it should have been repaired before the accident to plaintiff occurred; so that the error in the instructions under consideration was without prejudice.

Same—Harmless Error.

It is contended on behalf of counsel for the city that, under instructions given, the jury was authorized to assess double damages, in that the court directed that plaintiff's loss of time resulting from the injury, loss of time which she might sustain in the future, and her impaired ability to earn money in consequence of such injuries, both past and future, should be taken into consideration in estimating the amount of damages to be awarded. The court also directed the jury that her loss of capacity to perform her duties as nurse, and the amount of earnings which she lost in consequence of the

Same—Question of Damages.

injuries sustained, were proper elements of loss to be considered in estimating the amount of her damages. The instructions complained of are not as clear and definite as they might be, but, when considered in connection with the testimony, we do not believe they are susceptible of the construction that the jury was thereby directed to award damages for both loss of time and impaired ability to earn money covering the same period. The evidence was undisputed that plaintiff, from the time of the injury down to the trial of this cause, was wholly incapacitated from performing any labor whatever; that, from her then physical condition, it was probable she would be prevented from performing her duties as nurse for some time to come; and that her abilities in this respect might be more or less impaired in the future. So that we think it is fairly deducible from these instructions, when considered in connection with the testimony, that the jury understood she was entitled to recover for her loss of time, both past and future, and her loss resulting from an impaired capacity to perform her duties as nurse after partial recovery; and, in determining the amount to be awarded for these items, her ability to earn money prior to the accident in the performance of her duties as nurse should be taken into consideration.

Same—Harmless Error.

It is also claimed on behalf of appellant that it was error for the court to instruct to the effect that if it appeared from the evidence that plaintiff had a latent disease, which would not have been made manifest or caused her trouble except for the injury sustained by the fall, or that such condition was aggravated by the alleged injury, they were matters which could be considered by the jury in estimating damages. In support of this contention, Car Co. v. Barker, 4 Colo. 344, is cited. In that case it was determined that the plaintiff was not entitled to recover damages for an illness resulting from exposure caused by an accident to the car in which she was riding, for the reason that her then physical condition was the immediate and independent cause of such illness, and therefore not the approximate result of the defendant's negligence. It appears from the evidence that shortly after the accident, and down to the time of the trial, plaintiff had suffered seriously from trouble supposed to have been caused by disease of internal organs. The instruction in question does not pretend to direct the jury that damages should be awarded, except for injuries directly resulting from the accident. They state, in effect, that, if plaintiff was predisposed to a disease which was aggravated or accelerated by reason of the accident, she was entitled to recover the damages necessarily resulting from such aggravation or acceleration; in other words, that to the extent she was caused to suffer from the effects of a latent disease, above that which she would have suffered had it not been for the accident, she was entitled to recover. The sidewalks of the city are for the

use of those with organic predisposition to disease as well as for the healthy and robust, and any injuries which the former may sustain by reason of defects in such sidewalks, which result in aggravating an already diseased condition, are results for which the city must respond, if otherwise liable. Stewart v. City of Ripon, 38 Wis. 584; Railway Co. v. Kemp, 18 Am. & Eng. R. Cas. 220; Railroad Co. v. Buck, 96 Ind. 346; Brown v. Railway Co., 54 Wis. 342, 11 N. W. 356, 911; 5 Am. & Eng. Enc. Law (1st Ed.) 43. It is also urged that the statement in this instruction that the jury should take into consideration, "both in the determination of your verdict and in estimating the amount of the plaintiff's damages," any predisposition to disease aggravated by the injury if such appeared to be the fact, is erroneous, for the reason that the jury may have undertsood therefrom that the determination of the verdict depended upon this fact, instead of the negligence of the city. This is not fairly deducible from the statement complained of, although it would have been better to have limited it to the question of estimating the amount to be awarded. Notwithstanding the negligence of the city, plaintiff could not recover unless she had suffered damages; and therefore, in determining whether the verdict should be for or against her, it was proper to consider what injuries, if any, she had sustained from the source indicated.

Same—Same.

4. It is claimed on behalf of appellant that the verdict rendered is excessive, unless the evidence is sufficient to warrant the conclusion that plaintiff suffered internal injuries by reason of the accident. The evidence is clear that at the time of the trial she was suffering severely from some internal difficulties, which were manifest for the first time shortly after the accident. These troubles were of such a serious nature as to render her practically helpless. What particular internal organs were affected is not clear. The physicians called do not agree upon this proposition. Neither are they a unit as to what may have been the proximate cause of this condition. One of the physicians called gave it as his opinion that her internal condition was caused by the fall. None of the others stated directly that it was not, but they stated that they had never known such a condition as she presented due to an accident, or that such condition was not necessarily attributable to the accident. It appears from other evidence that plaintiff prior to the accident was a healthy and vigorous woman, and had never suffered from a deranged condition of any internal organs prior to that time; that shortly after the accident she was affected internally. This fact, in connection with the testimony of the physicians, we think, is amply sufficient to warrant the conclusion by the average layman that the deranged internal condition which she manifested at the trial, and which had existed a long time prior thereto, was caused by the fall.

Evidence—Sufficiency.

5. Counsel for the city predicate error on the refusal of the court to peremptorily instruct the jury to return a verdict for the defendant upon the proposition that the shape and size of the break in the sidewalk which caused the injury was such that the city was not negligent in failing to repair it. It was about 20 inches in length, and of an irregular width, averaging about 3 inches. It is not every defect in a sidewalk which can be made the basis of an action for an injury occasioned by an accident resulting therefrom. The defect must be such that a reasonably prudent person would anticipate danger from its existence. Its character must be determined, in this respect, like any other question of negligence. If it is of such a nature that different minds might honestly draw different conclusions as to its liability to cause an accident, and the dangers which might reasonably be anticipated from its existence, the question of whether or not it is negligence for a municipality to not repair or remove such a defect is a question which should be left to the jury. Beltz v. City of Yonkers, 148 N. Y. 67, 42 N. E. 401; Lord v. Refining Co., 12 Colo. 390, 21 Pac. 148; 2 Thomp. Neg. 1236; Railroad Co. v. Martin, 7 Colo. 592, 4 Pac. 1118; Shear. & R. Neg. § 11. Applying this rule to the evidence regarding the character of the defect which caused the accident, we think it was proper for the jury to determine whether the failure on the part of the city to repair it for this reason was negligence or not.

Negligence of Jury—Question for Jury.

6. The particular reason urged by counsel for respondent against the constitutionality of the jury act of 1899 is that the essential feature of unanimity in the rendition of a verdict, as established by the common law, is preserved by the constitution of the state. We have been greatly aided in the determination of this question by the able brief filed by counsel as amici curiae, who, although favoring the law, have fully presented the question in all its different phases. We have also had recourse to the concise, but logical, brief and argument of the assistant attorney general, which he furnished the chairman of the senate judiciary committee of the last general assembly in response to an inquiry from that committee regarding the constitutionality of the act in question, and in which he expressed the opinion that the act would not be constitutional. It is urged that the provision of the act permitting a verdict by a less number than the whole is a wise one, and coincides with the views of eminent jurists and others on this subject, and that in this advanced age we should no longer cling to what is termed by some that relic of barbarism and superstition which requires that a verdict must be unanimous. Whether the innovation is wise or not can in no manner aid in the solution of the question presented. The sole inquiry is, does the act conflict with the constitution of the state? The judiciary can only arrest a statute which is unconstitutional. As said by Judge

"Jury Act"—Constitutionality.

Cooley, "It cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power." Cooley, Const. Lim. (5th Ed.) 202. The tendency of recent years has been to attempt to remedy existing conditions by legislative acts having in view this worthy object. The result has been that many laws, wise and beneficent in character, when tested by the constitution have been declared invalid, solely because of their conflict with that paramount law. Under our system of government, the source of all power is from the people themselves. In their sovereign capacity the people of this state have adopted a constitution which is intended to place prescribed limitations upon the different branches of the state government, and any law which conflicts with their authority as thus manifested is unconstitutional, no matter what its object may be, for the obvious reason that, if upheld, a principle would be established whereby a constitutional barrier would be removed, which would permit legislation on the same line that might be exceedingly unjust and oppressive. It is no argument to say that the legislature, in its wisdom, would not pass laws other than those which were beneficial, because the test must always be, when the question is raised, does an act conflict with the constitution of the state?

The origin of the right of trial by jury in civil actions, as recognized and established by the common law, is involved in mystery. It has existed for centuries, and is essentially an Anglo-Saxon institution. Why its number, the necessity of unanimity, and other features, became fixed at common law, is not clearly known; but these requisites have always been an object of deep interest, and any encroachment upon them has been regarded with jealously. Parsons v. Bedford, 3 Pet. 441, 7 L. Ed. 732, 8 Curt. 474. It is a privilege which the English-speaking race has come to look upon as a birthright, —so much so that the English colonists settled here with a deep-rooted regard for it. This is evidenced from the fact that all that has been preserved of the legislation of Plymouth Colony for the first five years of its existence is "that all criminal facts, and also all manner of trespasses and debts, between man and man, shall be tried by the verdict of twelve honest men, to be impaneled by authority in form of a jury, upon their oath." 1 Palfrey, New England, 340; Proff. Jury, § 82. Ever since the formation of our government it has been guarded with the utmost care. Its omission from the federal constitution at the time of adoption caused much comment and dissatisfaction,—so much so that the First congress proposed an amendment, which was adopted, and which provided that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law." Seventh amendment. An examination of various state constitutions (except Wyoming

and our own, the provisions of which on the subject are identical, and also except Louisiana) discloses the fact that in 31 of the states the right has been preserved inviolate, as it existed at common law. Except in a few instances, the amount in controversy and the character of the action is the criterion measuring the right to a trial by jury. In 11 of the states the right is modified in one or more of the following features: The legislature is authorized to reduce the number, the constitution provides for less than the common-law number, that a certain proportion may find a verdict, or the legislature is empowered to provide for a jury of less than 12. It will be observed that, although the people in some instances have adopted constitutional provisions whereby the right as it existed at common law has been greatly modified, in no instance have they empowered the legislature to entirely abrogate this right, but have carefully indicated what modifications might be made, or have made them direct. That it has been so carefully guarded was noticed by Judge Caldwell in a recent address, in which he said: "While trial by jury was an undoubted heritage of the people of this country, they were unwilling that such a supreme and vital right should rest on the unwritten or common law. They were stern and inflexible in their demand that the right should be anchored in the constitution in terms so explicit and peremptory as to make any evasion or denial of it impossible, except by overthrowing the constitution itself. When the several provisions of the constitutions are read in connection, we are amazed at their fullness and completeness. No more resolute and inexorable purpose to accomplish a particular end ever found expression on paper." The American Lawyer, January, 1900, p. 9. In considering this question the remarks of the court in Work v. State, 2 Ohio St. 296, are peculiarly applicable: "An institution that has so long stood the trying tests of time and experience; that has so long been guarded with such scrupulous care, and commanded the admiration of so many of the wise and good,—justly demands our jealous scrutiny when innovations are attempted to be made upon it."

The language of the bill of rights relating to juries in civil actions is that "a jury in civil cases in all courts * * * may consist of less than twelve men, as may be prescribed by law." So far as the constitution of the state is concerned, the authority of the legislature within its sphere is supreme, except as limited by that instrument. People v. Fleming, 10 Colo. 553, 16 Pac. 298; Same v. Wright, 6 Colo. 92; Same v. Rucker, 5 Colo. 455; Same v. Richmond, 16 Colo. 274, 26 Pac. 929. Such inhibition may be express or by necessary implication. People v. Wright, supra; Cooley, Const. Lim. (5th Ed.) 208; Page v. Allen, 58 Pa. St. 338. There are no express words limiting the authority of the legislature with respect to juries in civil cases, and the inquiry naturally suggested is, does the language employed impliedly limit the leg-

islature to the one act of providing for a jury of less than 12? Unless it does, the only conclusion which can be reached is that, with respect to juries in civil cases, no limitation whatever is imposed upon the legislature by the constitution of the state, and that it may pass any law on the subject, or take away the right entirely. This serves to illustrate how far-reaching a constitutional question may be. Constitutional inhibitions arising by implication are as effective as though couched in express language. Page v. Allen, supra. To illustrate this proposition in a manner suggested by the last authority: The executive power of the state, according to the constitution, is vested in a governor; the legislative, in a senate and house of representatives. It would clearly violate these provisions of the constitution if the general assembly should provide for the election of two governors or two senates and houses of representatives; yet it would be unconstitutional only by implication, there being no express prohibition on the subject. The constitution is to be understood and interpreted in its plain, untechnical sense. Page v. Allen, supra. It is a canon of construction that effect must be given every part of the language employed in a law, unless to do otherwise is clearly justified; and the same rule forbids the rejection, as meaningless or superfluous, of any sentence or clause of a written law. End. Interp. St. § 23. Applying these principles, what is the plain meaning of the section of the bill of rights under consideration? The legislature was granted authority to pass a law which might provide for a jury in civil cases consisting of less than the common-law number. If it was intended to vest the legislature with supreme control over the subject of juries in civil actions, why grant authority to provide for the number only, instead of employing language which would remove all restrictions whatsoever? To hold that such grant of authority removes all restrictions would be a construction which renders the language employed superfluous,—in fact, would leave it without any effect whatever; whereas, if the intention was to preserve the right in all respects, except as to number, every word employed is given full force, meaning, and effect. So that, reading the section, and applying to the language employed its usual significance, and bearing in mind the doctrine of implication, the conclusion is irresistible that a fair construction of the section is that thereby the right of trial by jury in civil cases, as provided by the common law, is preserved in all its essentials, except the one of number. The constitution being but a limitation upon the authority of the legislature, it was wholly unnecessary to make any provision on the subject of trial by jury in civil cases if it was the intention to adopt a constitution which placed no restrictions upon the power of the legislature to enact laws regarding that right. Having mentioned it, the plain inference is that thereby it was to be preserved in the modified form designated. It is a familiar maxim of the law that the mention of one

thing is the exclusion of the other. This maxim, however, is only applicable under certain conditions, to determine the intention of a law which is not otherwise manifest, one of which is that, if that which is expressed is creative, then it is exclusive. Suth. St. Const. § 325. Applying this maxim to the section of the bill of rights in question, the same conclusion is reached. The authority to reduce the number of jurors from 12 is thereby created, and, in the absence of any express declaration of the further intention regarding trial by juries in civil actions, it follows that the legislature was granted no other authority than this, and, impliedly, that all other rights of trial by jury in civil actions were reserved. It is significant to note that section 23 of the bill of rights, as originally prepared, read as follows: "The right of trial by jury as heretofore enjoyed, shall remain inviolate, but a jury for the trial of criminal cases in courts not of record may consist of less than twelve men, as may be prescribed by law. * * *" The committee on revision recommended that it be changed to its present form, which recommendation was adopted. As originally drafted, it is clear that the right of trial by jury was expressly reserved, with all its essential features, with the one exception that in criminal cases in courts not of record a jury might consist of less than the common-law number. After the work of the convention was completed, a committee of that body was appointed to prepare an address to the people, informing them of its salient features. In that address it was stated, "The petit-jury system has been so modified as to permit the organization of a jury of less than twelve men in civil cases, thereby materially reducing the expenses of our courts." This language, especially when taken in connection with the section under consideration as originally framed, clearly expresses the plain import of the words therein employed, and indicates that it was the intention to preserve the right of trial by jury in civil cases with all its essentials, except as expressly modified.

Wyoming has a constitutional provision identical with section 23 of our bill of rights. The supreme court of that state, in Bank v. Foster, 61 Pac. 466, has recently held that a jury act similar to our own is unconstitutional. From the opinion of Mr. Justice Corn in that case, in construing the section of the bill of rights relating to jury trials, we quote the following: "In civil cases the language is also express as to the matter of number,—one of the three essentials of a jury trial at common law,—and the legislature is empowered to provide by law for juries consisting of less than twelve. There is no room for construction; but there is no specific mention in the section, or anywhere in the constitution, of the third essential of unanimity. Is it, then, to be deemed a matter unprovided for, a right not preserved, leaving the legislature at full liberty to enact such laws upon the subject as it may deem proper, unrestrained by the constitution? We do not think so. The

whole section must be construed together. The subject of it is the right of trial by jury; and we think the intention of the framers reasonably appears to have been to preserve the right inviolate in criminal cases, and to point out, by way of permission to the legislature, wherein the common-law right might be invaded by statute in civil cases. * * * There is no other reasonable construction; for, if a rule is to be applied, that the legislature have power to enact any laws upon the subject, unless prohibited in express language, then they may entirely abolish the right and practice of trial by jury in civil cases, for they are not expressly prohibited from so doing; yet there appears nowhere in the constitution any intention to abrogate the right, or to substitute any other mode of trial, but the form of statement, when viewed in the light of the surroundings, makes it manifest that the intention was to preserve the right."

We have been referred to decisions of this court wherein language is employed which might indicate a conflict with the conclusion reached in this case. In Huston v. Wadsworth, 5 Colo. 213, the question presented was whether or not the provision of the Code was constitutional which authorized a reference when the trial of an issue of fact required the examination of a long account on either side. It was held that no constitutional right was invaded by the Code provision under consideration. It was said that the constitution imposed no restriction upon the legislature in respect to the trial of civil causes by jury. The decision does not appear, however, to have been based upon this proposition, but, rather, upon the conclusion (following New York) that the character of the action was such that a trial by jury could not be demanded by either party as a matter of right. In Londoner v. People, 15 Colo. 557, 26 Pac. 135, it was said: "Our constitution does not declare that a jury may either be demanded or denied, as a matter of course, in the trial of civil cases; hence this is a proper subject for statutory regulation." The language of an opinion must always be considered in connection with the facts of that particular case, or the character of the action in which it is employed. That action was a quo warranto proceeding. At common law a jury could not be demanded as a matter of right in every civil action. Londoner v. People was not a cause in which either party was entitled to a trial by jury at common law, and the court therefore properly held that, in the absence of constitutional provisions with respect to the trial of all civil cases by jury, it was a proper subject for regulation by statute, which, so far as that case was concerned, was clearly correct. In Corthell v. Mead, 19 Colo. 386, 35 Pac. 741, the court said, "Trial by jury in civil cases is not guarantied by the constitution of this state." That question was not involved. The only one before the court was whether or not a trial before a jury less than the statutory number called before a justice of the peace

was binding; and on this subject the court held that, in the trial of a civil case by a jury before a justice of the peace, the jury may consist of any number of the parties agreed upon or accepted, without objection to the number. In none of the foregoing cases was the question of the extent to which the right of trial by jury in civil actions is preserved by the constitution involved; so that when these cases are reviewed in the light of the questions presented, and the character of the controversy between the parties, they are entirely distinguishable from the case at bar, and do not conflict with the conclusion reached in this case. The judgment of the district court is reversed, and the cause remanded for a new trial. Reversed and remanded.

NOTES.

Injury from Defective Streets—General Doctrine.—The duty cast upon a municipal corporation to keep its streets in a safe condition for travel is not absolute, so as to impose liability upon the corporation in every case where a traveller, without fault on his part, sustains injury from a defective street. Its liability depends in all cases upon negligence; that is, upon the fact whether it has omitted to exercise due care, under the circumstances, in their maintenance or reparation. The mere existence of a defect from which a traveller sustains injury does not, independently of negligence, establish a culpable breach of duty on the part of a municipality. Hunt *v.* Mayor, etc., of New York (N. Y.), 20 Am. & Eng. Corp. Cas. 380; McCarthy *v.* Syracuse, 46 N. Y. 194; Smith *v.* Mayor of N. Y., 66 N. Y. 295; Ring *v.* Cohoes, 77 N. Y. 83; Hubbel *v.* Yonkers, 104 N. Y. 434.

United States.—Cleveland *v.* King, 132 U. S. 295.

Alabama.—Selma *v.* Perkins, 68 Ala. 145.

Arkansas.—Fort Smith *v.* York, 52 Ark. 84.

California.—Arnold *v.* San Jose, 81 Cal. 618.

Colorado.—Denver *v.* Williams, 12 Colo. 475; Denver *v.* Dean, 10 Colo. 375.

District of Columbia.—Dant *v.* District of Columbia, 91 U. S. 557; Barnes *v.* District of Columbia, 91 U. S. 540.

Georgia.—Massey *v.* Mayor of Columbus, 75 Ga. 658.

Illinois.—Aurora *v.* Pielfer, 56 Ill. 270; Jefferson *v.* Chapman, 127 Ill. 438; Chicago *v.* Keefe, 114 Ill. 222.

Indiana.—Indianapolis *v.* Cook, 99 Ind. 15; Centerville *v.* Woods, 57 Ind. 192; Alexander *v.* Newcastle, 115 Ind. 51; Michigan City *v.* Borckling, 112 Ind. 40; Warsaw *v.* Dunlap, 112 Ind. 576.

Iowa.—Manderschid *v.* Dubuque, 29 Iowa 73.

Kansas.—Emporia *v.* Schmidling, 33 Kan. 485; Eikenberry *v.* Bazaar, 22 Kan. 56; Atchison *v.* Jansen, 21 Kan. 560.

Louisiana.—Cline *v.* Crescent City R. Co., 41 La. Ann. 1031.

Maryland.—Kennedy *v.* Cumberland, 65 Md. 514.

Minnesota.—Turnell *v.* St. Paul, 20 Minn. 117; Treise *v.* St. Paul, 36 Minn. 526; Altnow *v.* Sibley, 30 Minn. 186.

Notes

Mississippi.—Whitfield *v.* Meridan, 66 Miss. 570; Mackey *v.* Vicksburg, 64 Miss. 777.

Missouri.—Blake *v.* St. Louis, 40 Mo. 571; Roe *v.* Kansas City, 100 Mo. 190.

Nebraska.—Lincoln *v.* Gilliam, 18 Neb. 114; Plattsmouth *v.* Mitchell, 29 Neb. 228; Wahoo *v.* Reeder, 27 Neb. 770.

New York.—McCarthy *v.* Syracuse, 46 N. Y. 194; Ehrgott *v.* New York, 96 N. Y. 271; Hunt *v.* Mayor, etc., of New York, 109 N. Y. 134; Saulsbury *v.* Ithaca, 16 N. Y. 161; Turner *v.* Newburg, 109 N. Y. 301; New York *v.* Turze, 3 Hill (N. Y.) 612; St. Paul Water Co. *v.* Ware, 83 U. S. 574; Hutson *v.* New York, 9 N. Y. 163; Hume *v.* New York, 74 N. Y. 264; Wallace *v.* New York, 18 How. Pr. 174; Wilson *v.* Watertown, 3 Hun 512; Diveny *v.* Elmira, 51 N. Y. 513; Pettingill *v.* Yonkers, 116 N. Y. 558; Davenport *v.* Ruckman, 37 N. Y. 568; Weed *v.* Brockport, 16 N. Y. 161.

Ohio.—Cardington *v.* Fredericks, 46 Ohio St. 442; Shelby *v.* Clagett, 46 Ohio St. 549.

Oregon.—Farquar *v.* Roseburg, 18 Ore. 271; Sheridan *v.* Salem, 14 Ore. 328.

Pennsylvania.—Easton *v.* Neff, 102 Pa. St. 474; Brookville *v.* Arthurs, 130 Pa. St. 501; Briegel *v.* Philadelphia, 135 Pa. 451.

Texas.—Austin *v.* Ritz, 72 Tex. 391.

Utah.—Yearance *v.* Salt Lake City (Utah), 31 Am. & Eng. Corp. Cas. 10.

Virginia.—Richmond *v.* Courtney, 32 Gratt. (Va.) 792; Moore *v.* Richmond, 85 Va. 538; McCoull *v.* Manchester, 85 Va. 579.

West Virginia.—Wilson *v.* Wheeling, 19 W. Va. 324; Biggs *v.* Huntington, 32 W. Va. 55.

Wisconsin.—Seward *v.* Wilson, 21 Wis. 485. See also, Rushton *et al.* *v.* City of Alleghany *et al.*, 3 Mun. Corp. Cas. 29, and *note*; City of Circleville *v.* Sohn, 1 Mun. Corp. Cas. 50, and *notes* at end of case.

In Barnes *v.* District of Columbia, 91 U. S. 540, 547, the court said: "The statute (section 2640, Rev. St.), gives to municipal corporations the care, supervision, and control of all public highways, etc., and requires that the same shall be kept open, and in repair, and free from nuisance. In effect, it is a requirement that the corporation shall prevent all nuisances therein, and when by allowing a street to become so out of repair as to be dangerous the corporation itself maintains a nuisance, and a suit to recover for injuries thereby occasioned is for damage arising from a nuisance or 'for a nuisance.' The statute does not give a remedy; it but enjoins the duty. And when a duty to keep streets in repair is enjoined on municipal corporations, either by a statute in the form now in force, or by a provision which authorizes them to pass ordinances for regulating streets and keeping them in repair, and gives power to levy taxes for that purpose, and presumably to obtain a fund for satisfying claims for damages, a right of action for damages caused by such neglect arises by the common law."

New England Doctrine.—The decisions of the New England States and a few others hold that, unless there is a statute imposing liability upon a municipality for injuries caused by a defective street or sidewalk, any person so injured is without redress against the city for damages.

Notes

Cromarty *v.* Boston, 127 Mass. 329; Hewison *v.* City of New Haven, 37 Conn. 475; French *v.* City of Boston, 129 Mass. 592; Hill *v.* City of Boston, 122 Mass. 344; Pray *v.* Mayor of Jersey City, 32 N. J. L. 394; Macomber *v.* Taunton, 100 Mass. 255; Raymond *v.* Lowell, 6 Cush. (Mass.) 524; Leceister *v.* Pittsford, 6 Vt. 245; Bates *v.* Rutland, 62 Vt. 178; Dotin *v.* Village of Albion, 50 Mich. 129; Arkadelphia *v.* Windham, 49 Ark. 139; Young *v.* City Council, etc., 20 S. C. 116; Navasotoa *v.* Pearce, 46 Tex. 525; Detroit *v.* Blackeby, 21 Mich. 84; McCutcheon *v.* Homer, 43 Mich. 483; Barry *v.* City of Lowell, 8 Allen 127; Weller *v.* Burlington, 60 Vt. 28; Welsh *v.* Rutland, 56 Vt. 228.

In Merrill *v.* Portland, 4 Cliff. C. C. 138, MR. JUSTICE CLIFFORD makes the following statement as essential to a recovery under the statute of Maine: "The highway must be one which the town is bound to keep in repair. It must have been defective at the time of the accident. The plaintiff must have been injured as alleged in the declaration. The town must have had reasonable notice of the defect prior to the injury. The plaintiff must have been in the exercise of ordinary care at the time of receiving the injury. The injury must have been occasioned solely by the defect, and not by any want of ordinary care on the part of the plaintiff. The question whether the way was out of repair or defective, or not, is one of fact for the jury. Travellers, it was held, may receive injuries while travelling upon defective highways, and such as are not occasioned by the defects or their own negligence, and still the town required to keep the same way in repair may not be liable for the injury. An injury may be produced by the united effect of a want of repair in a road, and some other cause, and the injured party not be entitled to recover from those whose duty it was to keep the way in repair. If an obstruction be left in a street by a responsible party, still, if the town, by its own neglect, allow the obstruction to remain until it is chargeable with notice, the town is liable to a person injured by reason of the existence of such obstruction."

Same—Liability of City Where Duty to Repair Is Imposed by Charter.—Where a city accepts a charter conferring upon it the power and imposing the duty of keeping its streets and sidewalks in proper repair it is responsible in damages for the wrongful and negligent performance of the duty, and it is immaterial that such charter does not specifically impose such liability. City of Galveston *v.* Barber (Tex.), 8 Am. & Eng. Corp. Cas. 577; City of Galveston *v.* Posnainsky (Tex.), 13 Am. & Eng. Corp. Cas. 484; Boulder *v.* Niles Colo., 16 Am. & Eng. Corp. Cas. 475; Hutson *v.* Mayor, etc., 9 N. Y. 163; Noble *v.* Richmond, 31 Gratt. 271; Hutchins *v.* Mayor of Frostburg, 68 Md. 100; Albrittin *v.* Huntsville, 60 Ala. 486; Erie *v.* Schwingle, 22 Pa. St. 384.

Same—Duty Ministerial—Notice.—The duty of a city to keep its streets in repair being ministerial in its nature, it is held liable for all injuries from defects therein, if its officers have notice of such defects, or if they were negligent in not discovering them. Baltimore City *v.* Marriott, 9 Md. 160; Taylor *v.* Cumberland, 64 Md. 68; Weisenburg *v.* Appleton, 26 Wis. 56; Saulsbury *v.* Ithaca, 94 N. Y. 27; Peoria *v.* Simpson, 111 Ill. 294; St. Paul *v.* Seitz, 3 Minn. 297; Clark *v.* Richmond, 83 Va. 355; Anderson *v.* East, 117 Ind. 126; Farquar *v.* Roseburg, 18 Ore. 271; City of Denver *v.* Dean, 10 Col. 375; Olson *v.* City of Chip-

pewa Falls, 71 Wis. 558; City of Olathe *v.* Mizee, 48 Kan. 435; Mans *v.* City of Springfield, 101 Mo. 613; Cline *v.* New Orleans, 41 La. Ann. 1031; Dundar *v.* Lansing, 75 Mich. 499; Carrington *v.* St. Louis, 89 Mo. 208; Rehberg *v.* Mayor of New York, 91 N. Y. 137; Logansport *v.* Justice, 74 Ind. 378; Columbus *v.* Strassner, 124 Ind. 482; Batty *v.* Druxbury, 24 Vt. 155; Mathews *v.* Winooski T. Co., 24 Vt. 480; Willard *v.* Newbury, 22 Vt. 458; Barber *v.* Essex, 27 Vt. 62; Morse *v.* Richmond, 41 Vt. 435; Savage *v.* Bangor, 40 Me. 176; Phillips *v.* Veazie, 40 Me. 96; Munson *v.* Derby, 37 Conn. 298; Montezuma *v.* Wilson, 82 Ga. 206; Campbell *v.* Kalamazoo, 80 Mich. 655; Shelby *v.* Clagett, 46 Ohio St. 549.

Same—Negligence.—A city's liability depends not on its failure to exercise its power to open and improve streets but upon negligence in keeping them in proper repair after they are opened. Blaisdell *v.* Portland, 39 Me. 113; Lowell *v.* Moscow, 12 Me. 300; Huson *v.* New York, 5 Sandf. 289; Keyes *v.* Marcellus, 50 Mich. 439; Drury *v.* Worcester, 21 Pick. (Mass.) 44.

Same—Injury at Crossing.—When a person is injured while crossing a street he may recover for such injuries when they were caused by a dangerous defect, although the injuries were received while crossing the street at a place other than a crossing. City of Dallas *v.* Webb, 54 S. W. 398.

Same.—A person injured by a defect in the sidewalk can recover damages from the city for such injury although its charter provides that repairs shall be paid for by property owners, it being required to give the owner notice to make the improvements. City of Dallas *v.* Jones (Tex.), 54 S. W. 606.

EACHUS *et al.*

v.

CITY OF LOS ANGELES. (L. A. 917.)

(*Supreme Court of California, Nov. 19, 1900.*)

[62 Pac. Rep. 829.]

Constitutional Provision—Liability for Damages to Abutting Lot.*—Under Const. 1879, art. 1, § 14, providing that private property shall not be taken or damaged for public use without just compensation being made to the owner, a municipal corporation is liable to the owner of an abutting lot for damages caused by the excavation of a street.

Contractor—Grade of Street.—A contractor who conforms to the official grade in excavating and grading a street is not responsible to the abutting property owners for the damages caused thereby.

Allegation in Complaint—Damages.—A complaint which alleged that certain grading rendered a street and alley useless and impassable,

*See *note* to New Haven Saw-Mill Co. *v.* City of New Haven, 3 Mun. Corp. Cas. 65. Also, *In re* Chatham St., 2 Mun. Corp. Cas. 555, and *notes*, 556 *et seq.*

[illegible] v. City of Los Angeles

[illegible] access to plaintiff's property by said street and alley impossible, and greatly lessened the value thereof, is the damage of plaintiff, is sufficient to warrant evidence proving damages in the lot from other causes and reasons than by simply cutting off access thereto.

Pleadings—Defect—Special Demurrer.—Where a pleading is ambiguous, the defect must be taken advantage of by special demurrer, or it will be disregarded, under Code Civ. Proc. § 475, providing that defects in pleadings not affecting the substantial rights of the parties shall not be regarded.

General Demurrer—Ambiguity in Pleading.—A general demurrer will not be considered to raise the point of ambiguity of the pleading where, by an answer filed later, defendant shows that the pleading was understood in the sense intended by plaintiff.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; J. W. Mahon, Judge.

Action by Minnie J. Eachus and another against the city of Los Angeles. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Walter F. Haas, for appellant.

C. Edgar Gilbreth and D. C. Morrison, for respondents.

Cooper, C. This appeal is from a judgment in favor of plaintiffs and from an order denying defendant a new trial. The action was brought to recover damages caused by the excavation of First street in front of plaintiffs' lot. Plaintiffs were the owners of a lot in the city of Los Angeles, bounded on the east by Boylston street, on the west by an alley, and on the south by First street; said lot being a rectangle 50 feet wide by 142 feet long, running lengthwise along the north side of First street. The defendant, by ordinance duly adopted, established the grade of said First street some 28 feet lower than the surface of plaintiffs' lot, and in pursuance of said ordinance proceeded to and did excavate said First street and remove the earth therefrom to the official grade, and up to the south line of plaintiffs' lot, the full length thereof. The grading of said street resulted in leaving the plaintiffs' lot on the north side of said street some 28 feet above the official grade, thus cutting off plaintiffs' access to their said lot, and tending to depreciate the value thereof. The court found the plaintiffs' damage to be $1,200. It is claimed that the city, as a municipal corporation, is not liable to the owners of adjoining lots by reason of the excavation of the public streets of the city to the official grade. This, no doubt, was the rule under the former constitution of 1849 (article 1, § 8): "Nor shall private property be taken for public use without just compensation." In 1879 the present constitution was adopted by the people, and the provision was changed so as to read, "Private property shall not be taken or damaged for public use without just compensation having been first made or paid

into court for the owner." Const. art. 1, § 14. Under the above provision of our fundamental law it has been settled in this state—and in accord with the great weight of authority in other states under similar constitutional provisions—that the municipality is liable for damage caused to the owner of an abutting lot by excavating a street in front thereof. Eachus v. Railway Co., 103 Cal. 614, 37 Pac. 750. In the Eachus Case the authorities are reviewed at length, and the reasons for the rule stated, and we deem it unnecessary to repeat them here. The remedy is not against the contractor unless he departs from the line of the official grade. The city, in the establishment of the official grade of a public street, and in excavating and grading the street to the official grade, acts through its legally elected and qualified officers. When it lets a contract for the grading of the streets which it had the authority and power to let, it assumes the responsibility of paying all damages necessarily caused to private property by such grading. If the contractor should, of his own volition, go beyond his contract, either in the width or depth of the grade, or perhaps in other respects, the rule would be different.

Defendant made a motion to strike out all the evidence of plaintiffs tending to prove damages to the lot from any other cause or reason than by cutting off the access thereto. This motion was denied, and defendant now claims that such ruling was error. Defendant's contention is that the complaint does not allege damage in any other manner or way than that the grading rendered the street impassable, and cut off access to plaintiffs' property. We do not think the complaint susceptible of such narrow construction. It alleges that the grading "rendered the said Boylston street and said alley useless and impassable, and rendered access to plaintiffs' said property by said street and alley impossible, and utterly destroyed the value thereof, to the damage of plaintiffs in the sum of three thousand dollars." The words "value thereof" was evidently intended by the pleader to refer to the antecedent property. The most that can be said is that the sentence is somewhat ambiguous. This could have been reached by special demurrer; but no special demurrer was interposed, and we think the pleading sufficient as the record appears. The only demurrer was a general one, and, upon this being overruled, the defendant answered. In the answer defendant denied "that it utterly destroyed the value of either said property or said alley or streets, or either of them, either to plaintiffs' damage in the sum of three thousand dollars, or any damage, or at all, * * * or that it damaged plaintiffs' property, or any property, or the property in said complaint described, either in the sum of three thousand dollars, or in any other sum, or at all." It thus appears that the defendant did not raise the point by demurrer as to the ambiguity of the complaint; that it understood the complaint to allege that the value of the property was destroyed, when it denied in its answer that it destroyed

the value. Pleadings under our system must be liberally construed with a view to substantial justice between the parties. Code Civ. Proc. § 452. It is the duty of the court at every stage of the proceedings to disregard any defect in the pleadings which, in the opinion of the court, does not affect the substantial rights of the parties. Code Civ. Proc. § 475. If a complaint is defective in form, and not in substance, such defect can be reached only by special demurrer that the complaint is ambiguous or uncertain. Merritt v. Glidden, 39 Cal. 564. On the trial no objection to the complaint is open to inquiry except the want of jurisdiction, or that it does not state facts sufficient to constitute a cause of action. Tennant v. Pfister, 45 Cal. 272. It follows that the judgment and order should be affirmed.

We concur: Haynes, C.; Chipman, C.

Per Curiam. For the reason given in the foregoing opinion, the judgment and order are affirmed.

CONDE

v.

CITY OF SCHENECTADY *et al.*

(*Court of Appeals of New York, Oct. 2, 1900.*)

Local Assessments—Apparent Invalidity—Cloud upon Title.*—If the statute under which an assessment for a street improvement is made is unconstitutional because it requires the cost of the improvement to be apportioned upon abutting lots according to frontage, the invalidity of the assessment is apparent, and an action to set it aside as a cloud upon title cannot be maintained.

Same—Constitutionality of Frontage Rule—Waiver of Right to Question.—Where the only power the city had in the premises was to do the work at the cost of the abutting owners, to be apportioned among them according to frontage, a petitioner for the improvement necessarily asked that the work be done under such frontage rule, and thereby waived any question as to the constitutionality of such rule.

Same—Validity—Charter Requirements.—The scheme provided by the city's charter was that only one bond should be given when a bid was made on street work, which was to cover not only the execution of the contract for the work, but its performance; while the course taken by the common council was to require two bonds, one to accompany the bid, the other to be executed on the award of the contract. *Held*, that the irregularity could not be fatal, as the charter also provided that failure to comply with such provisions could not avoid an assessment.

Same—Same—Same—Estoppel.—A taxpayer cannot lie by and await

*See Eachus *et al. v.* City of Los Angeles, *ante* 149, and *foot-note*.

the completion of the street improvement, and then escape the local assessment because of such irregularities or defects in the proceedings.

Same—Same—Same—Conformity to Petition— Character of Material.—The petition for a street improvement asked for "Trinidad sheet asphalt;" the ordinance directed the street to be paved with "asphaltum sheet paving." The specifications required the material to be "refined lake asphalt," distinctly excepting "land or overflow asphaltum." The street was actually paved with Trinidad lake asphalt. It was not shown that the exclusion of "land and overflow asphalt" was an improper requirement. *Held*, that in excluding the land or overflow asphalt there was no departure from the terms of the petition, which tended to restrict competition, and might have enhanced the cost of the work.

Same—Same—Same.—A departure from the terms of such a petition, which worked no injury to the petitioner, could not invalidate a local assessment.

Public Improvements—Liability for Cost—Amendment of Charter.—Section 59 of the defendant city's charter, as enacted in 1890, provided that the cost and expense of repaving the street intersections should be borne by the city at large, but this section was amended in 1893 by omitting such provision. *Held*, that the effect of such amendment was to impose the whole cost of the improvement in question on the abutting lots.

Same—Payment.—Under section 61 of the defendant city's charter, the determination whether the assessment should be payable in installments or not was, in the absence of request by the petitioners for the improvement, vested in the common council.

Appeal by defendants from supreme court, appellate division, Third department.

Action by Benjamin L. Conde against the city of Schenectady and others to vacate an assessment. From a judgment of the appellate division affirming a judgment in favor of the plaintiff, entered on the decision of the court at special term (51 N. Y. Supp. 854), defendants appeal. Reversed.

S. W. Jackson, for appellants.

Robert J. Landon, for respondent.

Cullen, J. This action was brought to set aside an assessment imposed for the repaving of State street, in the city of Schenectady, and to restrain a threatened sale for nonpayment of the assessment. By section 51 of the charter of the city (chapter 385, Laws 1862, as amended by chapter 294, Laws 1890; chapter 190, Laws 1893), it is provided that no ordinance shall be adopted directing the pavement of the carriageway of a street with any other material than cobblestone, broken stone, or gravel, except upon a petition in writing, duly proved and acknowledged, by owners of lots abutting on the street constituting at least one-fourth of the frontage thereon. By sections 52 and 53 it is further provided that no ordinance shall be adopted until a

Case Stated.

hearing has been given all persons interested, after publication of the proposed ordinance. In July, 1894, a petition was presented to the common council, signed by the plaintiff and others, asking for the paving of State street with Trinidad sheet asphalt pavement, excepting the space occupied by the railroad tracks, which it was asked should be paved with granite blocks. Thereupon the common council adopted a proposed ordinance for paving the street with "asphalt sheet pavement." After publication and a hearing, the common council, on July 31st, enacted the proposed ordinance. The common council then adopted specifications for the work by which it prescribed that the paving should be laid of "the best quality of refined lake asphalt [distinctly excepting land or overflow asphalt] and heavy petroleum oil, unmixed with any of the products of coal tar." Bids for the work were advertised for. The contract was awarded to the Metropolitan Paving & Construction Company of the city of New York, which was the lowest bidder. The street was repaved under this contract with Trinidad asphalt, and an assessment for the cost laid on the abutting property. No attack on the character of the work is made, and no proof was adduced showing any fraud in the award of the contract or in the charge made for the work thereunder. The assessment, however, is alleged to be void because of irregularities and illegalities committed by the common council in the proceedings to effect the improvement and in laying the assessment therefor, which invalidity, it is contended, will not appear on the face of the proceedings, since by the charter the resolution of the common council making the assessment is presumptive evidence in all courts that the assessment was legally imposed, and that all notices and proceedings required therefor were duly given and taken. The points of attack on the assessment are numerous, and it is necessary to consider them in detail.

The charter (section 59) requires the cost of the improvement to be apportioned upon the lots of land abutting on the street "according to the number of feet frontage upon the same." It is claimed that such a rule of assessment is determined by the supreme court of the United States (Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443) to be in contravention of the federal constitution as taking property without due process of law. We think that a plain distinction can be drawn between the Norwood Case and the one before us. In the former, the improvement was the opening of a street through the lands of the plaintiff, in which he was undoubtedly entitled to compensation for the land taken,—a right of which he could not be constitutionally deprived. The same statute authorized the local authorities to assess the cost of the improvement and the expense of the proceeding upon the remaining lands of the plaintiff according to frontage and regardless of benefit. The effect of this

double proceeding of eminent domain and taxation was that the plaintiff lost his land without compensation, and was compelled to pay the expense of having the land taken away from him. These provisions of law were held to violate the federal constitution. In the present case no land is taken from the plaintiff. The proceedings is purely in the exercise of the power of taxation. That the land abutting on the street is benefited by the pavement or repavement of the street and should bear the expense seems very clear. Even where no provision is made by law for the apportionment of the expense according to the frontage of the land abutting on the street, the equity of the principle is so apparent that the rule has been almost universally adopted through the municipalities of this state. The case differs from the opening of a street or avenue, the main object of which improvement may, in special cases, be not to benefit the abutting land, but to afford access and communication between separate parts of the city or village, and thus inure to the advantage of the whole municipality. It seems to us that this distinction is justified by the previous decision of the supreme court in Parsons v. District of Columbia, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943, and Lominster v. Connant, 139 Mass. 384, 2 N. E. 690, the latter of which is cited with approval in the Norwood and Parsons Cases. But, whether the distinction sought to be drawn is well or ill founded, there are two sufficient answers to the plaintiff's claim in this respect—First. If the statute is unconstitutional and void, the invalidity of the assessment is apparent, and an action in equity to set it aside as a cloud upon title cannot be maintained. Stuart v. Palmer, 74 N. Y. 183. Second. The plaintiff was one of the petitioners for the improvement. The only power the city had in the premises was to do the work at the cost of the abutting owners, to be apportioned among them according to frontage. He necessarily asked that the work be done under that statutory rule, and thereby waived any question as to its constitutionality. A party may waive the benefit of a constitutional provision in his favor. Vose v. Cockcroft, 44 N. Y. 415.

Local Assessments—Apparent Invalidity—Cloud upon Title.

Same—Constitutionality of Frontage Rule—Waiver of Right to Question.

The ground on which the learned referee held the assessment bad was that the common council in its advertisement for proposals required a proposal to be accompanied by a bond conditioned that, if the proposal should be accepted, the bidder would enter into a contract with the city for doing the work at the prices stated, and give a further bond for its performance; while section 58 of the charter directs that no proposal shall be considered which is not accompanied by a bond conditioned that, if the proposal be accepted, the person making the same will not only enter into contract for the performance of the work, but also

Same—Validity—Charter Requirements.

perform the same. In other words, the scheme provided by the charter was that only one bond should be given when a bid was made on the work, which was to cover not only the execution of a contract, but its performance; while the course taken by the common council was to require two bonds, one to accompany the bid, the other to be executed on the award of the contract. The referee held that by this departure from the method prescribed by the statute the common council lost jurisdiction to carry out the improvement. We concede the course of the common council to have been irregular, and we may further concede, for the purposes of the argument, that the irregularity would have been fatal except for other provisions of the charter. Section 72 provides that "every assessment for a purpose authorized by this title shall be valid and effectual notwithstanding any irregularity, omission or error in any of the proceedings relating to the same. * * * Whenever it shall be deemed by the common council or be determined by the judgment of a court of competent jurisdiction that any assessment authorized by this title is illegal or void for want of jurisdiction, or for any other cause, the common council may pass an ordinance designating the work so made or done, the whole expense thereof, and the part or portion of the city deemed to be benefited thereby, or equitably chargeable with the costs and expense thereof, and may assess the several lots or parcels of land in the territory so designated in said ordinance, according to the benefits received or in the proportion in which they are equitably chargeable therefor." This is a curative act of the most comprehensive character; indeed, it is much more than a curative act. A curative act is a retrospective statute. Here the same statute which prescribes certain formalities and requirements to be observed in making local improvements and in imposing assessments therefor provides that irregularities or illegalities in the proceedings, i. e. failure to comply with these requirements and formalities, shall not invalidate the assessment. Therefore, any informality that the legislature might have originally dispensed with cannot avoid the assessment. Ensign v. Barse, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401. It was doubtless the duty of the common council to have strictly conformed to the law in the prosecution of this improvement, and, had the plaintiff timely intervened by a taxpayer's action, he could have restrained the common council from acting in contravention of the statute, but he could not lie by and await the completion of the improvement, and then escape the assessment because of irregularities or defects in the proceedings. It was this very evil that the section of the charter cited was intended to prevent.

Same—Same—Same—Estoppel.

The learned appellate division did not pass upon the point on which the case was decided by the referee, but affirmed the

judgment upon another ground. That court held that the common council had no jurisdiction to adopt an ordinance for any other kind of pavement than that which was called for by the petition, and that in the ordinance there was a substantial departure from the petition. The petition asked for "Trinidad sheet asphalt"; the ordinance directed the street to be paved with "asphaltum sheet pavement." The specifications required the material to be "refined lake asphalt," distinctly excepting "land or overflow asphaltum." The street was actually paved with Trinidad lake asphalt. The appellate division took notice that lake asphalt was Trinidad asphalt, but was of opinion that in excluding the land or overflow asphalt there was a departure from the terms of the petition, which tended to restrict competition, and might have enhanced the cost of the work. We cannot agree with this view. While it may be that we cannot take notice that lake asphalt and Trinidad asphalt are the same, there is no proof that they are different materials. The plaintiff got exactly what he asked for, Trinidad asphalt. For this reason, if the term "lake asphalt" is more comprehensive than "Trinidad asphalt it worked no injury to the petitioners, and, if it had any effect on the bidding, it must have increased the competition. By section 57 of the charter, the common council was authorized to make plans and specifications for the improvement. There is no proof to show that the exclusion of "land and overflow asphalt" was an improper requirement. If the petition had been for wooden blocks, the specifications might properly exclude those kinds of wood which are not fit for pavement; and, even had it specified oak blocks, it would have been within the power of the common council to exclude inferior kinds of oak. Further, under the view we have already expressed, the time for the plaintiff to have raised any objection was at the inception of the work.

Same—Same—Same—Conformity to Petition—Character of Material.

Same—Same—Same.

Section 59 of the charter, as enacted in 1890, provided that the cost and expense of repaving the street intersections should be borne by the city at large. This section was amended in 1893 (chapter 190) by omitting the provision quoted. The effect of this amendment was to impose the whole cost of the improvement on the abutting lots. There was therefore no error in the assessment in this respect. Under section 61, the determination whether the assessment should be payable in installments or not was, in the absence of request by the petitioners for the improvement (there was none in this case), vested in the common council. The other irregularities complained of we shall not discuss. Some of these alleged irregularities we think are not such, and the others are cured, so far as the validity of the

Public Improvements—Liability for Cost—Amendment of Charter.

Same—Payments.

assessment is concerned, by the provisions of section 72. The judgment appealed from should be reversed, and a new trial granted, costs to abide the final award of costs.

Parker, C. J., and O'Brien, Bartlett, Vann, and Werner, JJ., concur. Landon, J., not sitting.

Judgment reversed, etc.

KING *et al.*

v.

CITY OF PORTLAND *et al.*

(*Supreme Court of Oregon, Dec. 10, 1900.*)

[62 Pac. Rep. 2.]

Constitutional Law—Assessments for Repairs.*—Sess. Laws 1898, p. 156, § 138, requiring the council to assess the cost of improvements or repairs of the half street immediately in front of the abutting lots to such lots, and providing that the cost of street intersections shall be assessed five-ninths to the corner lot, or first 50 feet, and the remainder to the adjacent lot, or next 50 feet, in the quarter block, does not provide a tax so in excess of or out of proportion to the benefits received as to be a taking of property for public use without compensation, in violation of Const. U. S. Amend. 5.

Same—Notice to Abutters—Due Process of Law.—Sess. Laws 1898, p. 151, § 128, provides that before street improvements are made the council shall pass a resolution declaring its intention to make the same, which resolution shall be published for 10 consecutive days in a newspaper and posted at certain places, and that the property owners may file their remonstrances with the auditor within 10 days thereafter. *Held*, that the notice required gave the property owners opportunity to raise objections as to the excessiveness of costs over benefits, and as to the proportionment of the benefits, and hence the law is not in violation of Const. U. S. Amend. 14, as being a taking of property without due process of law.

City Council—Authority—Benefits.—Sess. Laws 1898, p. 150, authorizes a common council to make street improvements, and provides that each lot within the limits of the improvement abutting on the street shall be liable for the cost of half the street in front thereof. An elevated roadway, ranging from 10 to 15 feet in height, was built on a certain street, and the costs thereof taxed to the abutting lot owners, in accordance with the law; the tax varying according to the height of the roadway in front of each lot. *Held*, that the assessment against the lots was as nearly proportional according to the benefits as could be devised, and was therefore valid.

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*See Eachus *et al. v.* City of Los Angeles, *ante*, page 149.

King *v.* City of Portland

Appeal from circuit court, Multnomah county; John B. Cleland, Judge.

Application for an injunction by A. N. King and others against the city of Portland and others. From a decree in favor of defendants, plaintiffs appeal. Affirmed.

Case Stated.

This is a suit to enjoin the enforcement of a local assessment for a street improvement, consisting of an elevated roadway extending along East Yamhill street, between East Water street and Union avenue, in the city of Portland. The charter provisions bearing upon the present controversy (Sess. Laws 1898, p. 150) are, in substance, as follows: Sections 126 and 127 authorize the improvement. Section 128 requires that, before any improvement is made, the common council shall pass a resolution declaring its intention to make it, and describing the same, which resolution shall be posted in the office of the auditor and published for 10 consecutive days in a daily newspaper of the city, and that the city engineer shall cause to be posted a notice at each end of the line of the contemplated improvement, which shall state the fact of the adoption of the resolution, its date, the character of the improvement proposed, and the time within which written objection or remonstrance may be made thereto. Section 129 provides that within 10 days after the official publication of notice the owners of more than one-half of the abutting property may file with the auditor written objection or remonstrance, which shall be a bar to further proceedings unless the owners of one-half or more of such property shall subsequently petition therefor. Section 130: That, if no such objection or remonstrance be filed, the council shall be deemed to have acquired jurisdiction to order the improvement to be made, and shall, within four months from the date of the final publication of the resolution of intention, declare by ordinance the time and manner of said improvement. Section 131: That the auditor shall immediately transmit a copy thereof to the board of public works and the city engineer, and said board shall include, as a part of the costs of such improvement, the cost of advertisement, etc. Section 132: That said board shall without delay cause the engineer to prepare and file estimates and specifications of the amount of such work or improvement, and thereupon give five days' notice, and invite proposals for doing the work. Section 133: That said board shall, at the time set, examine the proposals and let the work. Section 136: That the auditor shall make the assessment and apportionment of the expenses of said improvement, in the mode and manner provided by section 138. Section 137: That whenever any improvement, the expense of which is to be assessed against the property benefited thereby, has been completed in whole or in such proportion as shall enable the said board to determine the cost of the whole thereof, the city

engineer shall file a written acceptance of the work so completed. Thereupon the board shall publish a notice of such completion and acceptance for six consecutive insertions in the official newspaper, stating the time and place where written objections to the acceptance of the improvement may be heard. At the time fixed, any owner or agent may appear and file objections to such improvement, which shall be heard and determined by the board; and, if it appear that the said improvement has not been completed in accordance with the specifications and contract, it shall not be approved until so completed. When approved, the board shall indorse the same upon the acceptance of the engineer, and file a copy with the auditor, together with the contract and the estimated expenses of advertising, etc. Section 138: That the auditor shall thereupon prepare an assessment to cover the entire cost of such work or improvement, and apportion the same to the property affected thereby within the limits of such work or improvement, as declared by the ordinance authorizing the same, in the manner following: "Each lot or part thereof within the limits of a proposed street improvement abutting upon the street shall be liable for the full cost of making the same upon half of the street in front of and abutting upon it, and also for a proportionate share of the cost of improving the intersections of two of the streets bounding the block in which such lot or part thereof is situated. * * * The cost of improving the intersection of streets, unless otherwise ordered by the council, shall be assessed upon the lots or parts thereof situated in the quarters of the four regular blocks adjoining such intersections, but only upon the lots or parts thereof within the quarter blocks nearest thereto and in the following proportion: Five ninths of the cost to the corner or first fifty feet; and four ninths of the cost to the lot next inside or the next fifty feet as laid out on the recorded plats." Section 139: That when the probable cost of the improvement has been ascertained, and the proportionate share assessed to each lot, the common council must declare the same by ordinance, and direct the auditor to enter a statement in the docket of city liens. Sections 140, 141, and 142 provide for a docket of city liens and the entry of the assessment therein, but that the same shall not be collected until by order of the common council; that 10 days' notice shall be given of the entry; and that if, within 30 days from the first publication of such notice the sum assessed is not wholly paid, the council shall thereafter order the issuance of a warrant to enforce the collection of the same. Section 158: That "the proceedings authorized by this chapter for the establishment or alteration of a grade or the improvement of a street or any part thereof may be taken or had without giving notice prescribed in section 128, whenever the owner or owners of two thirds of the adjacent property shall, in writing, petition the council therefor. And whenever any street or part thereof shall be in such condition as to become

impassable, unsafe or dangerous to persons or teams passing on, along or over the same the council may declare the same by resolution, and may thereupon cause the improvement of such street to be made, upon giving ten days' notice by publication in any paper of said city, and no remonstrance shall be heard thereto." The decree of the court below being in favor of the defendants, the plaintiffs appeal.

M. L. Pipes, for appellants.

J. M. Long, for respondents.

Wolverton, J. (after stating the facts). Several objections are interposed, directed against the legality of the assessment. The first is that the charter provisions under which it was made do not provide for an apportionment of the burden under a uniform rule, such as is required by the constitution. There is much discussion in the books as to whether an assessment for local improvements is a tax or not, but, whatever may be the true doctrine, it must be conceded that the authority to make such an assessment is necessarily lodged in the taxing power. This has been held so often that the controversy must be regarded as closed. Irrigation Dist. v. Bradley, 164 U. S. 112, 176, 17 Sup. Ct. 56, 41 L. Ed. 369. Apportionment of the burden is, however, essential, though it need not be made upon property in proportion to its value. Mr. Cooley says: "But, whatever may be the basis of the taxation, the requirement that it shall be uniform is universal. It applies as much to these local assessments as to any other species of taxes. The difference is only in the character of the uniformity, and in the basis on which it is established." Cooley, Const. Lim. (6th Ed.) 615. Mr. Justice Earl, in Stuart v. Palmer, 74 N. Y. 183, states the proposition as follows: "It is not disputed that the legislature has unlimited power, except as restrained by the federal constitution to impose taxes and assessments for public purposes. It may impose taxes upon all property within the state, and in such cases the owners are supposed to receive a compensation for the burdens thus imposed, in the protection and benefits of the government under which they live. It may impose taxes upon the local divisions of the state for the purposes of local government, and all the citizens residing in the locality must bear the burdens, as they all receive the benefits of the local government. It may cause or authorize local improvements to be made, and authorize the expense thereof to be assessed upon the land benefited thereby. But in all cases there must be apportionment of the burdens, either among all the property owners of the state, or of the local division of the state, or the property owners specially benefited by the improvements. In either case, if one is required to pay more than his share, he receives no corresponding benefit for the

Constitutional Law—Assessments for Repairs.

excess, and that may properly be styled extortion or confiscation. A tax or assessment upon property, arbitrarily imposed, without reference to some system of just apportionment, could not be upheld."

This brings us to the rule of apportionment, and in this connection may be considered the second objection, which is that the mode and manner of assessment for street improvements adopted and prescribed by the legislature through the city charter do not take into consideration the benefits, or limit or apportion the assessment by and in accordance with the benefits received, and therefore that the charter is in violation of the fifth and fourteenth amendments to the national constitution, which inhibit the taking of private property for public use, and without due process of law. Our state constitution has similar provisions (article 1, §§ 10, 18), so that, if the rule is in violation of one, it is also in conflict with the other. The case has been presented, however, by the allegations of the complaint and at the argument, with special reference to the federal question; and we will treat it more particularly in that light, for, if the legislative act prescribing the manner and mode of assessment is void under the national constitution, within the doctrine of the supreme judicial court of the United States, then we are precluded, as it is the final arbiter in the premises. It is asserted with substantial unanimity and great clearness by the courts in this country, as well as by text writers of erudition and learning, that, unless the nature of the case precludes it, the power to determine the confines of a taxing district for any particular burden is purely one of legislative discretion, and that the question of benefits accruing by reason of improvements contemplated is regarded as one of fact, which the legislature is always presumed to have considered and settled by the enactment. Mr. Justice Finch, in Spencer v. Merchant, 100 N. Y. 585, 3 N. E. 682,—a case involving the validity of an act whereby certain real property, situated in a prescribed district, which had not theretofore paid an assessment for a local improvement under an act declared to be void, was required to pay a sum of money then ascertained,—says: "The act of 1881 [the one in question] determines absolutely and conclusively the amount of tax to be raised, and the property to be assessed, and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. * * * The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but is not bound to do so, and may settle both questions for itself; and when it does so its action is necessarily conclusive and beyond review." This case went to the supreme court of the United States (s. c., 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763), and the doctrine thus promulgated was there directly approved and

affirmed, in the following language (Mr. Justice Gray speaking for the court): "In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the state, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either, like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit, and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of the commissioners." So, in Irrigation Dist. v. Bradley, supra, the court say: "The legislature, when it fixes the district itself, it supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question." In further support of the doctrine, see Cooley, Tax'n (2d Ed.) 640; King v. City of Portland, 2 Or. 146; Lent v. Tillson, 140 U. S. 316, 11 Sup. Ct. 825, 35 L. Ed. 419; Williams v. Eggleston, 170 U. S. 304, 18 Sup. Ct. 617, 42 L. Ed. 1047; People v. Mayor, etc., of Brooklyn, 4 N. Y. 419; Litchfield v. Vernon, 41 N. Y. 123. As has been indicated by some of the foregoing references to the authorities, the legislature may, instead of fixing and prescribing the taxing district itself, refer the matter to commissioners or local boards or bodies for their ascertainment and determination; and in such case the substituted bodies possess and exercise legislative functions, and their action must be deemed as conclusive upon the subject as if the legislature had exercised the authority directly. Cooley, Tax'n (2d Ed.) 640. The doctrine is laid down in Williams v. Eggleston, supra, as follows: "Neither can it be doubted that, if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement. And in so doing it is not compelled to give notice to the parties resident within the territory, or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited." See, also, Spencer v. Merchant, supra; Dickson v. City of Racine, 61 Wis. 545, 21 N. W. 620. The question of apportionment between the owners when the authority is delegated is quite a different thing. In such case the commissioners or body to which the duty is intrusted act quasi judicially, and there must be notice and an opportunity to be heard before the owner can be finally precluded and his property subjected to the payment of the assessment. Sears v. Commissioners, 173 Mass. 350, 355, 53 N. E. 876, and authorities there cited. See, also, 2 Dill. Mun. Corp. (4th Ed.) § 802a.

The manner of notice and the specific period of time in the proceedings when he may be heard are not very material, so that reasonable opportunity is afforded before he has been deprived of his property, or the lien thereon is irrevocably fixed. So it has been held that it is sufficient if the party is accorded the right of appeal or to be heard upon an application for abatement (see Towns v. Klamath Co., 33 Or. 225, 53 Pac. 604; Weed v. City of Boston, 172 Mass. 28, 51 N. E. 204, 42 L. R. A. 642), or the assessment is to be enforced by a suit to which he is to be made a party (Hager v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; Walston v. Nevin, 128 U. S. 578, 9 Sup. Ct. 192, 32 L. Ed. 544), or the right of injunction against collection is accorded, by which the validity of the assessment may be judicially determined (McMillen v. Anderson, 95 U. S. 37, 24 L. Ed. 335). In such case he cannot be heard to complain that his property is being taken without due process of law. The case of Paulsen v. City of Portland, 149 U. S. 30, 13 Sup. Ct. 750, 37 L. Ed. 637, covers the question of the right to notice and a hearing quite fully; and it is significant that special reference is made to the 10-days notice required to be given under section 104 of the charter as it then stood, after the assessment had gone upon the docket of city liens, and before collection can be proceeded with, which is almost the exact provision now contained in section 141. While the court at the time declined to decide that such a notice was sufficient, yet, if the cause had been dependent upon it alone, it is not altogether clear that it would have held it insufficient. So it was held by this court, in conformity with the prevailing rule, that, if provision is made for notice to and hearing of each proprietor at some stage of the proceeding upon the question of what proportion of the tax shall be assessed upon his land, there is not a taking without due process of law. Wilson v. City of Salem, 24 Or. 504, 34 Pac. 9, 691.

Same—Notice to Abutters—Due Process of Law.

The principle upon which is based the authority to take money as a tax for public use is that the taxpayer receives, or is supposed to receive, a just remuneration, in the protection which the government affords to life, liberty, and property, and in the increase in the value of possessions which comes from the use to which the money raised by the tax is applied. Cooley, Const. Lim. (6th Ed.) 613. Local or special assessments for local improvements stand upon a different basis. They are made and sustained upon the assumption that a prescribed portion of the community is to be especially benefited, in the enhancement of the value of the property peculiarly situated, as regards the proposed expenditure of the funds to be raised by the assessment. It is but a demand of simple justice that special contributions in consideration of special benefits should be made by those receiving the benefits, but such contributions ought not, by the same demand of justice,

to be enforced in any case beyond the benefits received. Cooley, Tax'n (2d Ed.) 606. Such an assessment is not in conflict with the provision of our state constitution requiring that "all taxation shall be equal and uniform." Article 1, § 32; King v. City of Portland, supra. It must be conceded, therefore, as was said by Mr. Justice Harlan in Norwood v. Baker, 172 U. S. 269, 279, 19 Sup. Ct. 187, 43 L. Ed. 443, that "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use, without compensation." The eminent jurist used the words "substantial excess" advisedly, because, as he explains, "exact equality in taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment." Judicial authority, were it necessary, is not lacking elsewhere in support of the doctrine. "The whole theory of local taxation or assessment," say the supreme court of Missouri in McCormick v. Patchin, 53 Mo. 33, "is that the improvements for which they are levied afford a remuneration in the way of benefits. A law which would attempt to make one person or given number of persons, under the guise of local assessments, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation." So, in State v. Mayor, etc., of Hoboken, 36 N. J. Law, 291, it was held that, to the extent of the excess of an assessment above benefits accruing by reason thereof, it was a taking of private property for public use without compensation, because that received by the owner was not equal to that taken from him. And again, in Dexter v. City of Boston (Mass.) 57 N. E. 379 (a recent case), the court say: "It is now settled law in this court, as it is in the supreme court of the United States and in many other courts, that after the construction of a public improvement a local assessment for the cost of it cannot be laid upon real estate in substantial excess of the benefit received by the property. Such assessments must be founded on the benefits, and be proportional to the benefits,"—citing the Norwood Case, and, among others, Sears v. Commissioners, supra, wherein the court say that "it is well established that taxation of this kind is permissible under the constitution of this commonwealth and under the constitution of the United States only when founded upon special and peculiar benefits to the property from the expenditure on account of which the tax is laid, and then only to an amount not exceeding such special and peculiar benefits." This marks the boundary, beyond which it is not within the power of the legislature to go, even in the determination of benefits as applied to a prescribed district. When, however, it is

plainly and palpably manifest from the surroundings (that is, from the physical condition of the property involved, its locality, the character of the work or improvement, the assessment, and from the very nature of things) that such an assessment is not adapted to the purpose, and is requiring of the owner a contribution to which he should not be subjected in that capacity, the court will interfere to prevent a consummation of the injustice.

City Council—Authority—Benefits.

But we are more concerned with the manner of apportionment as between owners within the assessment district. In this, as in prescribing the district, the legislature has a discretion commensurate with the broad domain of legislative power. 2 Dill. Mun. Corp. (4th Ed.) § 761, subd. 4. The mode which the legislature has prescribed is, in substance, that the cost of the half street in front shall be assessed upon the abutting lot or part of lot, and that the cost of street intersections shall be assessed five-ninths upon the corner lot, and the remainder upon the adjacent lot in the quarter block. The rule is invariable, and, when the cost of the improvement in front or at an intersection is ascertained, it must be assessed upon the property; and no discretion, legislative or judicial, abides with the municipal authorities to modify or abate it in the slightest measure. The method is perhaps the least justifiable, as a general rule, of any that has been devised, but that does not signify that it is not proper in any case. The Norwood Case would seem, at first thought, to forbid the application under all conditions of the front-foot rule, but it was probably not intended that it should be so far-reaching in its significance. As applied to that case, and all similar cases, it must be accepted as controlling. The rule has been many times upheld, and it is believed it yet may be, where the conditions are such that it may reasonably be supposed that the method adopted will secure a proportional distribution of the burden according to the benefits. Thus, in Sears v. Board, 173 Mass. 71, 53 N. E. 138, 43 L. R. A. 834, an assessment for sprinkling a street was sustained by the rule, because it did not appear that, as applied to the property assessed, it was not an approximately accurate method of determining benefits. In the opinion the proposition is stated that, "while these assessments must be founded upon benefits, the courts have generally recognized the difficulty, and in many cases the impracticability, of attempting to estimate benefits to estates one by one without some rule or principle of general application which will make the assessments reasonable and proportional, according to the benefits. Accordingly the determination of such a rule or principle by the legislature itself, or by the tribunal appointed by the legislature to make the assessments, has commonly been upheld by the courts. If, however, its effect plainly is to make an assessment upon any estate substantially in excess of the benefit received, it is set aside." This case was decided March 3,

1899, since the announcement of the Norwood Case. In the September prior, the same court decided the case of Weed v. City of Boston, supra, wherein it was held that assessments according to frontage of lots on a strip of private land taken for a sewer may be so grossly disproportionate to the benefits received by the land from the sewer that a statute authorizing them is unconstitutional. The court say: "The weight of authority is that an assessment according to the frontage of lots abutting upon a street or a public way in a city sometimes may be a reasonable mode of making an assessment for the cost of constructing a sewer in such street or way, because of the similarity of the lots, but that such an assessment when the sewer is not constructed in a street or way, or is constructed in the country, where the lots abutting are not laid out as building lots, often would be unreasonable." In the May following the announcement of the case of Sears v. Board, supra, another case was decided, entitled Sears v. Commissioners, 173 Mass. 350, 53 N. E. 876, whereby it was held that an act purporting to give the street commissioners power to levy a local assessment for a burden that was clearly general in its character, and that ought to be borne by the state at large, was invalid. And a year later the decision of Dexter v. City of Boston (Mass.) 57 N. E. 380, was handed down, which holds that the rule is vicious as applied to the construction of a sewer which, by reason of its turning at right angles upon plaintiff's lot, imposed a double burden (being assessed upon the two sides) as compared with other lots. The rule was applied by the common council and upheld in Wilson v. City of Salem, supra, upon the ground that the legislative judgment of the council had settled the matter as being an appropriate measure of benefits in that case.

The only basis upon which any devised method can be sustained is that it is reasonably calculated to the promotion of a substantial proportional distribution of the burden according to benefits. Mr. Dillon says: "The legislature has, within legislative limits, a discretion in providing the mode of ascertaining the benefits; but, even in the absence of express constitutional restriction, its power is not unlimited. This ascertainment may be made, and usually is, by a separate and actual estimate of special benefits. But where the lots in a town or city are small, of the same depth, and similarly situated, an ascertainment, under the conditions mentioned in a previous section, may be authorized on the basis of frontage, which is a convenient substitute for an actual estimate; but this mode cannot be authorized where it must inevitably operate with manifest inequality, as will often be the case with rural or suburban property, or where, from the circumstances, it is clear that it is legally impossible that an apportionment of the cost on this basis can be just or equal, or approximately so, and where injustice must certainly result from its adoption. The same general principle applies to an

assessment upon the basis of superficial area; and therefore where an assessment in this mode was authorized to be made, and was made equally upon the lands remote from the sewer and only slightly benefited, with no provision securing the right to connect with it, and upon lots fronting on the sewer and greatly benefited, the court considered the mode so arbitrary, so certain to work injustice, so flagrantly opposed to the principle of contribution in proportion to benefits, as to be unconstitutional." 2 Dill. Mun. Corp. (4th Ed.) § 989. So it was held upon like principle by this court that an assessment for a local improvement upon property not at all benefited, although within the taxing district, would be annulled, as it would amount to a taking without due process of law. Oregon & C. R. Co. v. City of Portland, 25 Or. 229, 35 Pac. 452, 22 L. R. A. 713. The same idea pervades the judicial utterances of the supreme court of the United States. Parsons v. District of Columbia, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943, is a case wherein congress by legislative enactment provided for a comprehensive system of water supply in the District of Columbia, through street mains, and that the assessment for such purpose should be levied upon abutting lots or property at the rate of $1.25 per foot front. It was objected that the system adopted did not afford the owner an opportunity to be heard upon the question of costs, benefits, or apportionment, and that the assessment was not made upon the basis of benefits to the property assessed. But the court held (Mr. Justice Shiras announcing the opinion) that none of the objections were well taken. "Our conclusion," it was said, "is that it was competent for congress to create a general system to store water and furnish it to the inhabitants of the District, and to prescribe the amount of the assessment and the method of its collection, and that the plaintiff in error cannot be heard to complain that he was not notified of the creation of such a system, or consulted as to the probable cost thereof. He is presumed to have notice of these general laws regulating such matters. The power conferred upon the commissioners was not to make assessments upon abutting properties, nor to give notice to the property owners of such assessments, but to determine the question of the propriety and necessity of laying water mains and water pipes, and of erecting fire plugs and hydrants, and their bona fide exercise of such a power cannot be reviewed by the courts." The opinion quotes from 2 Dill. Mun. Corp. (4th Ed.) § 752, as follows: "Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property, or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency." The

Norwood Case distinguishes this by the significant observation that "there is no such disproportion between the amount assessed and the actual cost as to show any abuse of legislative power." In Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270 (decided in 1896), it was said: "The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by commissioners." See, also, Mattingly v. District of Columbia, 97 U. S. 687, 24 L. Ed. 1098. Walston v. Nevin, supra, is very similar, as respects the matters in controversy, to the case at bar. The statute prescribing the manner of making assessments is as follows: "When the improvement is the original construction of any street," etc., "such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the general council according to the number of the square feet owned by them respectively, except that corner lots * * * shall pay twenty-five per cent. more than others for such improvements. Each subdivision of territory bounded on all sides by principal streets shall be deemed a square." An assessment made in pursuance of the statute was attacked as in conflict with the fourteenth amendment of the national constitution, but it was upheld, the court saying: "The statute has been repeatedly before the Kentucky court of appeals, which has sustained it as constitutional and proper legislation; the powers vested thereby in the local government being subjected to the supervision of the courts, where the particular facts in each case can be examined, and the controversy determined by those rules and principles which have always governed courts in dealing with questions of assessment and taxation,"—citing Preston v. Roberts, 12 Bush, 570; Beck v. Obst, 12 Bush, 268; Baptist Church v. McAtee, 8 Bush, 508. Further on in the opinion the court cites Davidson v. City of New Orleans, 96 U. S. 97, 24 L. Ed. 616. After quoting from the opinion of Mr. Justice Miller, it draws the conclusion therefrom "that neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the state authorities are controlled by the federal constitution. So the determination of the taxing district and the manner of the apportionment are all within the legislative power. * * * And, whenever the law operates alike on all persons and property similarly situated, equal protection cannot be said to be denied." The same principle is maintained in the case of In re Washington Avenue, 69 Pa. St. 352, where it was

held (Mr. Justice Agnew rendering the opinion) that it was incompetent for the legislature to create a district mainly in rural domain for the construction of an artificial road seven miles long, the expense to be paid by assessments upon lands within the district. It was apparent from the very nature of things that the road was a general public benefit, for which a local assessment could not be maintained, and in this respect was like the case of Sears v. Commissioners, supra. In the course of the opinion it was said: "Taxation, according to the benefits received, is neither unequal nor unjust, and cannot, therefore, come into conflict with those clauses in the bill of rights which regard as sacred the right of private property. So long, therefore, as a law faithfully and reasonably provides for a just assessment according to the benefits conferred, and does not impose unfair and unequal burdens, it cannot be said to exceed the legislative power of taxation, when exercised for proper objects. It is on this ground only that assessment according to the frontage of property on a public street to pay for its opening, grading, and paving is to be justified. As a practical result, in cities and large towns, the per foot front mode of assessment reaches a just and equal apportionment in most cases. Hence this mode has been deemed a reasonable exercise of the taxing power in such places, with a view to taxation according to the benefits received. Whatever doubt might have been originally entertained of it as a substitute (which it really is) for actual assessment by jurors or assessors under oath, it has been so often sanctioned by decision, it would ill become us now to unsettle its foundation by disputing its principle. But it is an admitted substitute, only because practically it arrives, as nearly as human judgment can ordinarily reach, at a reasonable and just apportionment of the benefits on the abutting properties. Hence the fairness of the rule of charging benefits by frontage was a conceded point in Hammett v. City of Philadelphia, 65 Pa. St. 155. But this rule, as a practical adjustment of proportional benefits, can apply only to cities and large towns, when the density of population along the street, and the small size of lots, make it a reasonably certain mode of arriving at a true result." See, also, Cleveland v. Tripp, 13 R. I. 50; Raleigh v. Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330; Allen v. City of Davenport (Iowa) 77 N. W. 532.

Since the decision of the Norwood Case, assessments by the front-foot rule have been sustained in several of the states of the Union. In the case of Cass Farm Co. v. City of Detroit (Mich.) 83 N. W. 108, which involved a street pavement, in the course of the opinion the court quotes from Mr. Justice Cooley in Sheley v. City of Detroit, 45 Mich. 431, 8 N. W. 52, as follows: "We might fill pages with the names of cases decided in other states which have sustained assessments for improving streets, though the apportionment of cost was made on the same basis as the one before us. If anything can

e regarded as settled in municipal law in this country, the ower of the legislature to permit such assessments, and to irect an apportionment of the cost by frontage, should by this ime be considered as no longer open to controversy. Writers n constitutional law, municipal law, and on the law of taxaion have collected the cases, and have recognized the principle as settled; and, if the question were new in this state, ve might think it important to refer to what they say. But he question is not new. It was settled for us thirty years go." But the court distinguished the case from that of Norwood v. Baker on the ground that it was for paving a treet, while that was for street-opening purposes, and refused o disturb the rule that had been so long followed in the state. n Indiana it was sustained in Adams v. City of Shelbyville Ind. Sup.) 57 N. E. 114. The case involved a stone curbing, vhere what is known as the "Barrett Law" was upheld. The ule was also sustained in North Dakota, in Webster v. City of Fargo, 82 N. W. 732 (an assessment for street paving); in Minnesota, in State v. District Court, 83 N. W. 183, 7 L. R. A. 121 (also for street paving); in Missouri, in Heman v. Allen Mo. Sup.) 57 S. W. 559, and Paving Co. v. French (Mo. Sup.) 38 S. W. 934 (the former of which involved a sewer assessment, and the latter the pavement of a street); in New York, by the court of appeals, in Conde v. City of Schenectady, 38 N. E. 130 (a street-paving case); and in California, in Hadley v. Dague, 62 Pac. 500 (for street improvement). Texas has condemned the rule unqualifiedly (Hutcheson v. Storrie [Tex. Sup.] 51 S. W. 848, 45 L. R. A. 289), and the ederal circuit courts are uniform in their holding to the same purpose (Fay v. City of Springfield, 94 Fed. 409; Loeb v. Trustees, 91 Fed. 37; Charles v. City of Marion, 98 Fed 166; Cowley v. City of Spokane, 99 Fed. 840; Charles v. City of Marion, 100 Fed. 538).

But we are inclined to believe that the better doctrine delucible from adjudged cases, including those of the supreme court of the United States, is that the assessment will be upheld wherever it is not patent and obvious from the nature and location of the property involved, the district prescribed, he condition and character of the improvement, the cost and elative value of the property to the assessment, that the plan or method adopted has resulted in imposing a burden in substantial excess of the benefits, or disproportionate within the listrict as between owners. This must be so, logically and necessarily, in view of the broad latitude accorded the legislature, in its discretion, to prescribe the taxing district, and the nanner and method of making the assessment within the district, as it concerns individual owners and proprietors. As the writers say, the authority of the legislature in these respects is almost without limit; yet that there is a limit beyond which it cannot go, all will concede. When, however, it has exercised its egislative discretion, and prescribed a district and adopted a

method, it ought to be plain and indisputable that it has exceeded its constitutional authority, before the court should undertake to set at naught its declared will. Neither ought the system to be condemned because there may be exceptions wherein it would work a legal injury to enforce it. If such an exception arises, as was the case in Oregon & C. R. Co. v. City of Portland, supra, the court will not enforce it, but it will hesitate long to condemn the rule because of the exception. The rule upon which the assessment is made in the present case has been upheld in several jurisdictions. Warren v. Henly, 31 Iowa, 31; Gatch v. City of Des Moines, 63 Iowa, 718, 18 N. W. 310; Sands v. City of Richmond, 31 Grat. 571; White v. People, 94 Ill. 604. Upon this subject Mr. Dillon observes: "It may be true that in some instances more hardship will be occasioned by requiring each owner to make or pay for the improvement in front of his own property than if the cost were assessed on the basis of frontage or of supposed benefits received. Still it seems to the author difficult to find satisfactory and solid ground on which to discriminate the cases so as to hold that one is within the constitutional power of the legislature, and the other is not." 2 Dill. Mun. Corp. (4th Ed.) § 753.

Now, let us look at the law, and ascertain, if we can, whether it is legally sustainable upon principle. The common council is empowered by the legislature to fix and determine the taxing district. This it did by adopting the resolution of intention to make the improvement. Its action in this regard is legislative in character, and it was not requisite that the legislature should have provided for notice before the council was authorized to act. In prescribing the district, it must be presumed, as would have been the case if the legislature had itself acted directly, that it took into consideration the exceptional benefits that would accrue to the property which it was intended should be charged with the burden, because it could inaugurate or make such an assessment upon no other basis. A notice in the present instance was required by the charter, and given, however, and, while it was for the purpose of acquiring jurisdiction, it gave the property holders an opportunity to appear and file objections to the improvement; and it was perfectly competent for them to raise both the objection that as a district the costs would be in excess of the exceptional benefits to the property involved, and that as it respects individual holders, and between themselves, the assessment would not be proportional to the relative benefits to be derived from the improvement. This is what, in fact, was done by the plaintiffs, as shown by the record, and upon this issue they were accorded a hearing. It was also possible for the common council to determine the matter with reasonable accuracy, as the probable cost and distributive share thereof among the holders was known to them, as was also the locality and situation of the property to be assessed. The

manner adopted for the assessment of the costs and expenses against the respective lots is wholly legislative in its nature. The common council is accorded no discretion, but is to make the assessment as directed by the charter. Its function in that respect is clerical, merely, as no choice is lodged with it to vary the rule adopted. Such being the nature of the assessment, no notice or hearing would seem to be requisite under Parsons v. District of Columbia, supra. But the charter afforded an opportunity to be heard sufficient under other authorities to support the assessment. There are four several notices required along the way: First, of the proposed improvement; second, inviting proposals for doing the work; third, touching the acceptance of the work; fourth, 10 days' notice of the entry of the assessment in the docket of city liens. Ample opportunity was thus afforded the owners to appear and interpose the constitutional objections, which is all that is sought to be done in this proceeding. The improvement consists of an elevated roadway, ranging from 10 to 15 feet in height throughout, except at one intersection, which was a fill; and it is apparent that the cost of the work was practically uniform throughout, and the assessment against the lots was therefore as nearly proportional according to benefits as could be devised. At least, it is not apparent that there is any substantial excess of costs above benefits, nor is there such a disproportionate distribution of the burden as to justify the court in declaring the assessment an arbitrary exaction by the legislature. It is beyond the power of human ingenuity to adopt any plan or mode of assessment that will operate to produce exact uniformity, and all that may be expected is a reasonable approximation to such a standard, and the rule adopted under the charter fulfills the condition as applied to the present controversy. There is no doubt that the property was benefited in excess of the costs and expenses. These considerations affirm the decree of the court below, and sustain as valid the assessment involved by the proceeding. We have arrived at this conclusion not without some misgivings. But, in view of the fact that the manner of the assessment, as here found to exist, has been followed substantially in its present form since 1864 (see published charter of the city of Portland of 1872); that many miles of street improvements, in various forms, have been made and constructed in pursuance of it; that hundreds of thousands of dollars have been expended under the rule; that numerous titles are depending upon it, and to that extent it has become a rule of property; that tax bills issued in pursuance of it are bought and sold in the market upon the faith of it; that many bonds are outstanding, depending for their validity upon its legality; and that it has time and time again been before the courts of the state and sustained, although not upon the exact point here involved (which was never mooted until after the decision in the Norwood Case),—we deem it unwise at this late date to disturb

and be the whole matter as large as if there had never been a law upon the subject, this meeting the financial exigency of the city government and perhaps many titles which it bears. It would be far better that the legislature should change the procedure than that we should nullify it as to that with a long train of evils certain to follow in its wake, and to that source of power resort should be had, if an [illegible] for its separation. Where a law is clearly without the pale of the constitution, such a method is proper to declare it void. But unless it so appears, or where a reasonable doubt exists, it should be resolved in favor of upholding the will of the legislature, which department of the government is as much bound by the letter of the constitution as the judiciary, and is always presumed to have acted within its authority.

PIKES PEAK POWER CO.

v.

CITY OF COLORADO SPRINGS.

(Circuit Court of Appeals, Nov. 5, 1900.)

[105 Fed. Rep. 1.]

Circuit Courts of Appeals—Jurisdiction of Constitutional Questions Optional.—In any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States the circuit courts of appeals may either (1) decline to take jurisdiction, or (2), where other questions are involved, take jurisdiction, and certify the constitutional question to the supreme court, or (3) take jurisdiction, and decide the whole case in the first instance. 26 Stat. 826, c. 517; Carter *v.* Roberts, 20 Sup. Ct. 713, 177 U. S. 500.

Same. Where a dismissal of an appeal would cause a delay of years in the decision of a case of considerable importance which involves a constitutional question, the circuit court of appeals takes jurisdiction, and decides the whole case in the first instance.

Municipality Use of Water System and Streets by Private Parties Transmission of Electricity.—In September, 1898, a city passed an ordinance granting to J. and his assigns the right for a term of 25 years to use the water and water system of the city to produce power to generate electricity, and the right to lay conduits, to erect poles, to string wires, and to maintain and operate them in its streets during this term, on condition that the grantees would return the water to the system undiminished in flow, and without pollution; that they would do nothing to impair the efficiency of the water system; that they would complete the driving of a tunnel through a spur of a mountain for the city for the purpose of enlarging its water system and its supply of water; that they would carry its telegraph and telephone wires in their con-

duits and on their poles, and would furnish the city with a certain amount of electric power and certain electric lights free of cost, and with others at a fixed price during the term of the grant, and that at the end of the term they would vest in the city the ownership of a certain pipe line and any electrical plant they had then constructed to supply the electric lights. *Held*, that under the general power to manage and control the property of the city, to light its streets and public places, to manage its water system, and to control and regulate the use of its streets, the city council of the city had lawful authority to pass this ordinance.

Same—Acceptance of Ordinance—Repeal.—After the ordinance of September, 1898, had been accepted, and after the grantees had proceeded in the performance of their part of the contract for five months, the city council, in February, 1899, passed an ordinance which, by its terms, repealed the ordinance of September, 1898. *Held*, the repealing ordinance violated section 10, art. 1, of the constitution, which prohibits the passage of a law impairing the obligation of contracts, and the fourteenth amendment to the constitution, which forbids the taking of property without due process of law.

Same—Constitutional Law.—An ordinance of a city passed under the legislative authority of a state is a law of that state, within the meaning of that term in the constitution and statutes of the United States.

Same—Grant for Private Use.—A grant by a city of rights and privileges in its streets, parks, public grounds, or water system for private use,—that is to say, a grant from which neither the city, its citizens, nor the public receive any consideration or derive any benefit,—is beyond the powers of the municipality, and void.

Same—Grant for Public Purposes.—A city has authority, under its general powers, to grant to private parties for public purposes reasonable rights and privileges in its water system, its streets, its public grounds, and its other public utilities, provided that such grant and its exercise do not materially impair the usefulness of these utilities for the public purposes for which they were acquired or dedicated.

Same.—The ordinance of September, 1898, was not for purely private use, but for the public purposes of procuring an enlargement of the water system of the city, of obtaining the use of electric lights for the municipality, and of securing conduits and poles to carry its wires.

Same—Private Electric Light Plants.—The Colorado statute (3 Mills' Ann. St. p. 1144) which provides that the city councils of cities in that state shall have power to erect waterworks, gas works, or electric light works, or to authorize their erection by others, only when such works shall be erected or authorized pursuant to a favorable vote of the taxpayers of the cities, applies only to works erected by the cities themselves or by others under contracts with or for the cities. It has no application to such works erected by private parties for their own use.

Same—Powers.—A city has two classes of powers, the one legislative, public, governmental, in the exercise of which it acts as a sovereign and governs its people, the other proprietary, *quasi* private, business, conferred upon it for the private advantage of its inhabitants and itself.

Same—Exercise of Its Business Powers.—In contracting for the enlargement of its water system, for electric lights for municipal use, and

for the use of conduits and poles to carry its wires, a municipality is exercising its proprietary or business powers, is subject to the same rules of law that govern the agreements of private corporations, and its contracts bind its successive sets of officers.

Same—Control of Public Utilities.—The water system and the other public utilities of a city are held by the municipality and its officers in trust for the public purposes for which they were acquired and dedicated. The city and its officers may not renounce this trust, disable themselves from discharging it, or so divert or impair the public utilities that they become inadequate to accomplish the public purposes for which they were created.

Same—Utilities Created for Public Purposes.—A city and its officers have the authority, and it is their duty, to apply the surplus power and use of public utilities for the benefit of the municipality and its citizens, provided such application does not materially impair their usefulness for the public purposes for which they were created.

Same.—A city council has authority, under its general powers, to lease to private parties the use of the water flowing through its water system to enable them to generate power to create electricity, where such lease does not impair the usefulness of the water or the system for the municipal purposes for which they were obtained by the city.

Contracts — Delay in Performance — Forfeiture — Enforcement in Equity.—A court of equity will not enforce a forfeiture of the rights and privileges of the grantees in a contract for their failure to complete their performance of it in time, where the party seeking the forfeiture was guilty of the first breach of the agreement, and failed to pay installments due under it while the work was in progress until compelled to do so by judgments of the courts, and had persistently endeavored to revoke and annul the grant, while the grantees were vigorously prosecuting their part of the work under it, which they had, within the time limited by the agreement, substantially performed, although they had not completely finished it.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Colorado.

Guy Le R. Stevick and Charles J. Hughes, Jr. (Henry M. Blackmer and Henry McAllister, Jr., on the brief), for appellant.

W. S. Morris and R. E. Lewis (J. W. Ady, on the brief), for appellee.

Before Caldwell, Sanborn, and Thayer, Circuit Judges.

Sanborn, Circuit Judge. This is an appeal from a decree dismissing the bill of the Pikes Peak Power Company, a corporation, upon the merits at the final hearing. The suit which culminated in that decree arose in this way: For many years the city of Colorado Springs, the appellee, has derived its supply of water from watersheds on the slopes of Pikes Peak some 19 miles from

Case Stated.

ıe city, and more than 6,000 feet above the level of the sea. 'he city owns more than 4,000 acres of land on these slopes, nd it collects the water from rains and melting snows into :servoirs in the mountains, and by open flumes and iron ipes conducts it thence to the city, where it is distributed)r the usual municipal purposes. The population and busi- ess of the city had so increased in 1895 that the supply of 'ater which it had theretofore drawn from the eastern slopes f Pikes Peak was inadequate, and the city concluded to in- rease it by deriving an additional store from the western lopes of the mountain. The means devised to accomplish ıis purpose consisted of a reservoir on West Beaver creek for ıe collection of the water on the western slopes, and a tunnel t an elevation of about 11,500 feet above the level of the sea, bout 6,400 feet in length, through one of the spurs of the ıountain, to conduct the water to Middle Beaver creek on the asterly side of the peak, whence it would flow into the flumes nd water pipes of the city. Thereupon, on December 27, 895, Wilson & Jackson, a partnership composed of Charles L. Wilson and George W. Jackson, made a contract with the ity to bore this tunnel on or before September 27, 1897. 'hey entered upon the undertaking, but it proved to be far ıore difficult and expensive than any of the parties had an- cipated. A slide of loose rock, or a cave-in, was encountered n the line of the tunnel, which proved an insuperable obstacle) its construction on that line, and compelled the contract- rs to drive the tunnel on a detour more than 350 feet in :ngth, while the distance on the line of the tunnel from the oint of departure from it to that of the return to it was only bout 130 feet. The high altitude at which the tunnel was)cated, the difficulty of transporting fuel, tools, and materials) that height, and developing power to drive and complete it, ıade its cost several times its contract price. As these ob- tacles developed, the city aided the contractors by a gift of 11,500, and by extending the time for the completion of the 'ork until September 27, 1898. George W. Jackson became ıe successor of Wilson & Jackson, borrowed money, and pparently prosecuted the work of driving the tunnel to the est of his ability; but the undertaking became so expensive, nd the amount of his indebtedness so great, that he was nancially unable to carry it on without further assistance, and ı the early days of September, 1898, it was evident that he ould not complete it in the time or on the terms specified in ıe original contract, and its extension, and that he could not omplete it in any way unless he could acquire some rights or rivileges upon which he could get credit and borrow money) continue the work. While the contract price of the tunnel 'as only about $90,000, it had then cost more than twice that mount, and, if he had then abandoned it, it would have cost ıe city more than $100,000 to complete it. In driving the ınnel, Jackson had used electrical power, which he had

created on the side of the mountain at an electrical plant of 200 horse power by the use of the water flowing down the mountain side which was subsequently led into the water system of the city of Colorado Springs, and distributed to its inhabitants. In this way he had learned that it was practicable to use this water for the development of electrical power without wasting or polluting it. In this state of the case, the city of Colorado Springs, by the passage of an ordinance on September 8, 1898, which was accepted by Jackson on September 10, 1898, made a grant to and an agreement with him which provided that the respective parties thereto should derive the following considerations or benefits therefrom: The city granted to Jackson, his associates or assigns, for the term of 25 years from September 8, 1898: (1) The right and privilege of laying, maintaining, and operating such conduits, cables, and wires in the streets and alleys within the fire limits of the city, and of erecting, maintaining, and operating such poles and wires in the streets and alleys of the city outside its fire limits as should be necessary for the transmission and sale to the city and its inhabitants of electricity for the development of electrical power, and the right and privilege of renting space in the conduits. (2) The right and privilege of constructing, maintaining, and operating at suitable places on the lands of the city and through the lands, rights of way, streams, reservoirs, flumes, ditches, pipe lines, and conduits of the water system of the city, dams, reservoirs, pipe lines, conduits, power houses, plants, poles, wires, and cables for the transfer and transmission of electrical power, together with the right to use from such lands such earth, stones, and dead timber as might be needed to construct such power houses, reservoirs, plants, and dams. (3) The right to divert and use for the generation of electrical power all the water of any streams, ditches, flumes, pipe lines, conduits, and reservoirs of the city on condition that all water so diverted should be returned to the water system of the city unimpaired; that the use thereof under the contract should not diminish the flow of nor pollute the water; that the city should determine what constituted waste and pollution; that Jackson, his associates and assigns, should do nothing which would interfere with the successful operation of the city's system of waterworks; that the work under the contract in the city should be done under the supervision of the city, and that the city reserved its right to exercise its police power over the conduits, poles, and wires provided for by the contract. The consideration or the benefits which Jackson, his associates or assigns, agreed by this contract to bestow upon the city in return for this grant were: (1) The completion of the tunnel on or before December 8, 1899, on the terms specified in the original contract of 1895. (2) The necessary space in all the conduits they should lay, and on all the poles they should erect, for the telegraph and

telephone wires of the city, and freedom of access and facilities for placing and removing them equal to those which Jackson and his associates or assigns should enjoy. (3) During the time between one year after the completion of the tunnel and September 9, 1923, such electric lights as should be necessary for lighting the public buildings of the city, not exceeding 5 arc lights of 2,000 candle power and 200 incandescent lights of 16 candle power; and such electrical power as should be necessary for municipal purposes, not exceeding 50 horse power, free of cost; and such arc lights of 2,000 candle power as should be necessary for lighting the streets, alleys, and public grounds of the city for $5.50 per light per month. (4) On September 9, 1923, any electrical plant to furnish these lights and this power and any transforming station, wires, cables, and other improvements which Jackson, his associates or assigns, shall have then constructed, strung, or made for the purpose of transforming and delivering the electricity necessary to furnish these lights and this power, and a 20-inch water pipe line from Lake Moraine to some point in the town of Manitou. On the faith and credit of this contract Jackson borrowed of various parties more than $80,000, pledged his rights and privileges under the ordinance to secure his debts for this amount, and proceeded with the construction of the tunnel. He organized the Pikes Peak Power Company, the appellant, and on January 16, 1899, assigned to it all his rights and privileges under his contract for stock in that corporation, which he pledged to secure the money he had borrowed. In this state of the facts, after Jackson had borrowed this money, and proceeded on the faith of the contract with the work of driving the tunnel through the mountain, and on February 23, 1899, the city passed an ordinance, which, by its terms, repealed the ordinance of September 8, 1898. Thereupon, on May 3, 1899, the Pikes Peak Power Company exhibited its bill in the circuit court, in which, and in an amendment to it, which it subsequently made, it set forth the foregoing facts, and prayed that the repealing ordinance might be adjudged void as violative of the constitution of the United States, and that the city might be enjoined from interfering with the exercise by the power company of the rights and privileges granted to Jackson and his assigns by the ordinance of September 8, 1898. The city answered the amended bill. Its answer was that no rights and privileges were granted to Jackson, his associates and assigns, for various reasons, the chief of which was that the city of Colorado Springs had no power to make the contract, or to vest in any one the rights and privileges bestowed by the ordinance of September 8, 1898. On this ground the circuit court dismissed the bill at the final hearing, and this appeal challenges that ruling.

At the opening of the investigation of this case we are confronted with the claim of counsel for the appellee that this

court is without jurisdiction to review the decree below, because this is a case in which the law of a state is claimed to be in contravention of the constitution of the United States. The foundation of the suit is that the city of Colorado Springs passed an ordinance which, by its terms, repealed an earlier ordinance, and thereby annulled a contract between it and the appellant, and took away the property rights of the latter without due process of law, in violation of section 10, art. 1, of, and of the fourteenth amendment to, the constitution of the United States. The answer of the city to this claim was that, while there was a contract in form, there never was any agreement in law, because the city had no power to make the contract which it assumed to effect. This defense was sustained by the court below. The appellant now insists that that court was in error because it did not hold that the city of Colorado Springs had lawful authority to make the contract, and because it did not also hold that its repealing ordinance was violative of the constitution. In this way it may be seen that this case is one in which a law of a state (for an ordinance of a city passed under the legislative authority of a state is such a law within the meaning of the federal constitution and statutes,—City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341) is claimed to be in contravention of the constitution of the United States, and that the suit involves the question whether or not this repealing ordinance is so violative of the constitution, together with other questions which must be considered and determined before the whole case can be decided. Section 5 of the act of March 3, 1891 (26 Stat. 826, c. 517), declares that appeals may be taken to the supreme court "(6) in any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States." Section 6 provides that in cases other than those named in section 5 the circuit courts of appeals may exercise appellate jurisdiction unless otherwise provided by law. These provisions of the organic law of this court have seemed plain to us, and we have accordingly frequently held that the supreme court had exclusive jurisdiction, and that this court had no jurisdiction to review a judgment or decree in any case which was controlled by the question whether or not the constitution or law of a state was in contravention of the constitution of the United States. Merritt v. Barge Co., 75 Fed. 813, 815, 21 C. C. A. 525, 526, 40 U. S. App. 127, 129; Hastings v. Ames, 68 Fed. 726, 728, 15 C. C. A. 628, 630, 32 U. S. App. 485, 488; Railway Co. v. Evans, 58 Fed. 433, 434, 7 C. C. A. 290, 292, 19 U. S. App. 233, 235; Pauley Jail Bldg. & Mfg. Co. v. Crawford Co., 84 Fed. 843, 942, 28 C. C. A. 579, 580, 56 U. S. App. 53, 55; Wrightman v. Boone Co., 88 Fed. 435, 437, 31 C. C. A. 570, 573, 60 U. S. App. 100, 104. We are, however, advised by two late decisions of the supreme court that our jurisdiction

Circuit Courts of Appeals—Jurisdiction of Constitutional Questions Optional.

to review the class of cases described in the sixth subdivision of section 5 of the act of March 3, 1891, is optional with ourselves, and that we may take or decline to take jurisdiction thereof as to us seems just and proper. That court says:

"When cases arise which are controlled by the construction or application of the constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the circuit courts of appeals, those courts may decline to take jurisdiction, or where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance." Carter v. Roberts, 177 U. S. 496, 500, 20 Sup. Ct. 713, 44 L. Ed. —; Railroad Co. v. Thiebaud, 177 U. S. 615, 620, 20 Sup. Ct. 822, 44 L. Ed. —.

The case before us has been fully argued upon its merits. It is of much public importance. It involves the management of the water system and the lighting system of the city of Colorado Springs. The interests of the city and its inhabitants, as well as those of the power company, demand its early decision, and a dismissal of this appeal would almost inevitably lead to a delay of years in its determination. In view of these facts, we have concluded not to decline to take jurisdiction, and to proceed to "decide the whole case in the first instance."

Same.

It was not claimed in the argument of counsel for the appellee in this court, and it is not asserted in their brief, that the repealing ordinance of February 23, 1899, was not violative of the constitution of the United States if the contract evidenced by the ordinance of September 8, 1898, and its acceptance were valid, and binding upon the city. The repealing ordinance is so clearly a violation of section 10, art. 1, of that instrument, which prohibits the passage of a law impairing the obligation of contracts, and of the fourteenth amendment to the constitution, which forbids the taking of property without due process of law, that no argument to the contrary would be worthy of a moment's consideration, and no contention of that character is made. The position upon which the counsel for the city chiefly rely is that the grant of the rights and privileges found in the ordinance of September 8, 1898, was beyond the powers of the municipality, and void, so that no contract resulted from the acceptance of its terms, and no rights vested under it. In support of this contention they present numerous arguments, to which our attention will now be directed. They say that a grant by a municipality of rights and privileges in its streets, alleys, parks, and public grounds for private use is invalid; that this ordinance was a grant for such a use, and that it is, therefore, void. The major premise of this syllogism, when properly understood,

Municipality—Use of Water System and Streets by Private Parties—Transmission of Electricity.

Same—Acceptance of Ordinance—Repeal.

Same—Constitutional Law.

Same—Grant for Private Use.

and limited in its meaning, may be conceded to be sound; but the minor premise is unfounded in fact. The grant evidenced by the ordinance of September, 1898, was not made for a purely private use. A grant for a private use is one from which neither the city nor its citizens derive any consideration or benefit. Such a grant cannot be sustained. This proposition is well illustrated by State v. Murphy, 134 Mo. 548, 565, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369, upon which, and upon other cases of a similar character, which are cited in their brief, counsel for the city seem to rely. In that case the city of St. Louis had granted to a private corporation, for the exclusive use of the latter, the right to lay and maintain in the streets of that city conduits for carrying wires and cables, and had reserved no consideration or benefit to the city or the public from the grant of the right or from its exercise. It was held that such a grant for a purely private use was beyond the powers of the municipality. That decision rested, however, on the express ground that the grantee was placed under no obligation to use the rights and privileges granted to it in any way or to any extent for the benefit of the public, and that no duty whatever to the public, the city, or the citizens was imposed upon it. The supreme court of Missouri nevertheless expressly declared in its opinion that:

"Under its general power to regulate the use of streets the city has authority to authorize corporations and persons, for the purpose of serving the public, to string telegraph, telephone, or electric light wires upon poles above the surface or through conduits beneath the surface of the streets provided such structures and mechanical appliances do not materially interfere with the ordinary uses of the streets and public travel thereon." Pages 562, 565, 566, 134 Mo., pages 786–788, 31 S. W., and pages 374, 375, 34 L. R. A.

The grant now before us falls under the rule stated in this quotation. It was not a grant for a purely private use, for the use of the grantees alone. It was not a grant which imposed no duty to the city and to the public upon Jackson, his associates and assigns. It was not a grant for which the city exacted no consideration, and from which it derived no benefit. On the other hand, the ordinance and its acceptance secured to the city and to the public the completion of the tunnel, the use of all conduits and poles of the grantees for its telegraph and telephone wires until September 8, 1923, the use of such electric lights as should be necessary to light its public buildings, not exceeding 5 arc lights of 2,000 candle power and 200 incandescent lights of 16 candle power, and of such electrical power as should be necessary for municipal purposes, not exceeding 50 horse power, free of cost, until September 8, 1923, and on that day any electrical plant which the grantees shall have then constructed to light the streets and public buildings of the city and a 20-inch water pipe line

Same—Grant for Public Purposes.

Same.

from Lake Moraine to Manitou. Here were grave duties to the public and onerous public service imposed upon the grantees in this ordinance, and ample consideration secured to the city to sustain the contract.

The arguments in which counsel have indulged to minimize and expunge the public benefits and service which the city secured by this contract have not been overlooked, but they have failed to convince. They say that Jackson was bound, under his original contract of 1895, to complete the tunnel, so that his agreement to do so, evidenced by his acceptance of the ordinance of September 8, 1898, added nothing to the benefits which were already secured to the city before that acceptance was made; that the only other public service imposed by the ordinance was furnishing the city with electric lights and the erection and maintenance of a plant for that purpose, and that the ordinance was inoperative in that respect because a majority of the voters of the city who were taxpayers did not cast their ballots in favor of authorizing the erection of this plant under a clause of the statutes of Colorado found on page 1144, 3 Mills' Ann. St., which reads:

"They [city councils] shall have power to purchase or erect waterworks or electric light works; or to authorize the erection of the same by others; but no such works shall be erected or authorized until a majority of the voters of the city or town who are taxpayers under the law voting on the question at a general or special election, by vote approve the same."

Same—Private Electric Light Plants.

But the difference to the promisee between the agreement of a man who is financially unable to perform his contract to expend $100,000 in completing it, and the agreement of the same man to do the same thing when he is financially willing and able to do it, is wide and substantial, and this was the important public benefit and consideration which the city secured in the construction of the tunnel by the contract of September 8, 1898. When the ordinance of that date was passed, Jackson had exhausted his means and his credit in his attempt to drive the tunnel through the mountain under his contract of 1895, and there still was required the expenditure of about $100,000 to complete it. The contract evidenced by the ordinance gave him rights and privileges upon which he was able to borrow the money, strengthened his credit, and enabled him to substantially complete the performance of his contract. This was no slight or immaterial consideration, and it cannot be whistled down the wind, or concealed from view, by harping on the fact that the promise of one who is unable to expend anything is as binding and forceful as the agreement of one who is able and willing to perform his contract. There was another material consideration secured to the city under this agreement. That was the use, during the term of the grant, of all the conduits which the grantees should lay, and of all the poles which they

should erect to carry the telegraph and telephone wires of the city, and, at the end of the term, the pipe line from Lake Moraine to Manitou. Moreover, the statute of Colorado, which has been quoted, does not, in our opinion, avoid or render inoperative that portion of the ordinance and contract which secured to the city the use of the electric lights and power, and that for several reasons. In the first place, the ordinance does not purport to grant to Jackson, his associates or assigns, the authority to erect electric light works, and therefore a vote of the taxpayers was not required by the statute to authorize its passage. The authority granted by the ordinance is limited to the construction of proper plants for generating electricity by water power, and of conduits, wires, and poles for the transmission of the electric fluid. In the second place, the statute has no application to electric light plants erected by private parties for their own business purposes. It applies only to waterworks, gas works, and electric light works purchased or erected by cities, or built for cities, under contracts with them, by other parties. It was not—it could not have been—the intention of the legislature to require the approving vote of the majority of the taxpayers of a city every time its council issued a license to a corporation, partnership, or person to erect or install a gas plant or an electric light plant upon its premises for domestic or business uses. Again, there is nothing in the ordinance which requires the grantees to erect or maintain any electric light plant whatever. It does impose upon them the duty, and they have assumed the obligation, to furnish to the city electric lights and electric power; but the contract leaves it optional with them to produce and supply this light and power themselves, or to persuade others to do so for them. The result is that the grant contained in the ordinance of September 8, 1898, was made for well-recognized public purposes, for the enlargement of the water system and the induction of the electric lighting system of the city of Colorado Springs, and it secured to the city ample consideration to sustain it. Under the statutes of Colorado this city was empowered to regulate the use of its streets, to provide for the lighting of the same, to pass all ordinances and to make all rules and regulations proper or necessary to exercise these powers. 2 Mills' Ann. St. § 4403, par. 66. Under these powers it had ample authority to grant the rights and privileges of constructing power houses to generate electricity in suitable places on its public grounds, of laying conduits, and of erecting poles on its streets, and of stringing wires in the conduits and on the poles to transmit the electrical power in such a way that these conduits, poles, and wires would not materially interfere with the ordinary uses of the streets and grounds by the public, and subject to the police power of the city as provided by the ordinance of September 8, 1898. 2 Dill. Mun. Corp. (3d Ed.) §§ 692, 697; Chicago Municipal Gaslight & Fuel Co. v. Town of Lake, 130 Ill. 42,

54, 22 N. E. 616; Gregsten v. City of Chicago, 145 Ill. 451, 461, 34 N. E. 426; City of St. Louis v. Western Union Tel. Co., 149 U. S. 465, 469, 13 Sup. Ct. 990, 37 L. Ed. 810; State v. Murphy, 134 Mo. 548, 561, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369.

Another position urged by counsel for the appellee is that the system of waterworks of this city, its streets, parks, and public grounds, are held by the municipality in its political or governmental, and not in its proprietary or business, capacity; that, consequently, they cannot be diverted from municipal uses, and a city council cannot make any agreement or contract relative to them which a succeeding council may not freely annul. The proposition is not novel. It has received the careful consideration of this court, and, so far as the question it presents is material to the issues in this case, it is no longer open to debate here. In Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 282, 22 C. C. A. 171, 181, 40 U. S. App. 257, 276, 34 L. R. A. 518, 525, this court announced its conclusion in these words:

Same—Powers.

"A city has two classes of powers,—the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class it is governed by the rule here invoked. In their exercise it is ruling its people, and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation. Dill. Mun. Corp. (3d Ed.) § 66, and cases cited in the note; Safety Insulated Wire & Cable Co. v. City of Baltimore, 13 C. C. A. 375, 377, 378, 66 Fed. 140, 143, 144; San Francisco Gas Co. v. City of San Francisco, 9 Cal. 453, 468, 469; Com. v. City of Philadelphia, 132 Pa. St. 288, 19 Atl. 136; New Orleans Gaslight Co. v. City of New Orleans, 42 La. Ann. 188, 192, 7 South. 559, 560; Tacoma Hotel Co. v. Tacoma Light & Water Co., 3 Wash. St. 316, 325, 28 Pac. 516, 519, 14 L. R. A. 669; Wagner v. City of Rock Island, 146 Ill. 139, 154, 155, 34 N. E. 545, 548, 549, 21 L. R. A. 519; City of Vincennes v. Citizens' Gas Light Co., 132 Ind. 114, 126, 31 N. E. 573, 577, 16 L. R. A. 485; City of Indianapolis v. Indianapolis Gaslight & Coke Co., 66 Ind. 396, 403; Read v. Atlantic City, 49 N. J. Law, 558, 562, 9 Atl. 759. In contracting for waterworks to supply itself and its inhabitants with water, the city is not exercising its gov-

ernmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens. 1 Dill. Mun. Corp. § 27; City of Cincinnati v. Cameron, 33 Ohio St. 336, 367; Safety Insulated Wire & Cable Co. v. City of Baltimore, supra, and cases cited under it."

Same—Exercise of Its Business Powers.

The purpose of the city in making the contract of September 8, 1898, was to enlarge its waterworks, to increase its supply of water, and to furnish itself and its inhabitants with electric light. In contracting for these purposes the city was exercising its proprietary or business powers. It is controlled by the same rules that govern a private corporation, and its contract bound its successive sets of officers.

Same—Control of Public Utilities.

The next proposition which counsel for the city seek to maintain is that the water sytsem of the city and the water which flows through it are held in trust by the municipality for the suppression of fires, for the domestic use of its inhabitants, and for other customary municipal purposes; and that the city council has no power to divert them to the generation of electricity for private use, or to any such purposes. Before entering upon the consideration of this position, let us see what the power of the city is in regard to the establishment and management of its water system, and what, under the facts of this case, this contention really is. The statutes of Colorado provide that the city councils of cities in that state shall have power to manage and control all their property (2 Mills' Ann. St. § 4492); to erect waterworks on a favorable vote of their electors (2 Mills' Ann. St. § 4403, par. 67); "to construct or authorize the construction of such waterworks, without their limits, and for the purpose of maintaining and protecting the same from injury and the water from pollution, their jurisdiction shall extend over the territory occupied by such works, and all reservoirs, streams, trenches, pipes and drains, used in and necessary for the construction, maintenance and operation of the same, and over the stream or source from which the water is taken, for five miles above the point from which it is taken; and to enact all ordinances and regulations necessary to carry the power herein conferred into effect" (Id. par. 68); to construct reservoirs in public places in the city or beyond the limits thereof for the purpose of supplying the same with water; to provide proper conducting pipes to regulate the distribution of water for irrigation and other purposes (Id. par. 72). From these provisions of the statutes it will be seen that the city council of the appellee had plenary authority to manage and control the water system and all the property of the city, and to distribute and apply its water not only to ordinary municipal uses, but to "irrigation and other purposes." These were the powers of the council in this re-

gard. Now, what was the state of facts when the ordinance of September, 1898, was passed? The city was not then engaged in initiating and constructing a system of waterworks. That had already been done. A system extending from watersheds on Pikes Peak, 19 miles distant, and 6,000 feet above the level of the sea, had been constructed and operated for years. The city had outgrown this system, and a contract had been made three years before for the construction of a tunnel to enlarge it, and to increase its supply of water. The contractors had exhausted their means and their credit, and the tunnel still lacked an expenditure of $100,000 to complete it. This was the state of the facts. No one questions the power of the council of this city to contract for this tunnel, and to agree to pay for it in the money of the city. No one questions its power to procure electric lights, conduits, and poles to carry its telegraph and telephone wires, and to pay for them with the funds of the city. Its authority to do these things is so plain and full that it cannot be denied. Now, what did the city do, and what is the actual contention of its counsel here? The price agreed upon by the contract of 1895 for the completion of the tunnel was not compensatory. It would not pay for the work necessary to be done. The contractors could not complete it without other compensation. Thereupon the city did this: It procured the completion of the tunnel, the right to use the conduits and poles of Jackson, his associates and assigns, to carry its wires, electric lights for its public buildings, and electric power to the extent of 50 horse power, without the payment of an additional dollar of the city's money, in consideration of a permit or license which it gave to the grantees in the September ordinance of the right to use the idle water power that existed and was running to waste in its water system. Now, what is the real contention of the counsel for the city here? It is that, while the city council might lawfully have contracted for these public utilities, and have taxed its constituents, and have paid out their money to obtain them, it had no authority to procure them for and to pay for them with the idle water power that existed in the water system of the city, without the expenditure of a dollar of the money of the citizens. It is, in fact, that municipal corporations hold all that part of public utilities which they cannot apply to customary municipal uses in trust to waste to the loss of their cestuis que trustent, and not in trust to use for their benefit. This proposition, when reduced to its last analysis, finds no support in reason or authority. It is true, as counsel for the city assert, that the water, the water system, and the other public utilities of a municipality are held by it and by its officers in trust for its citizens, and for the public; that neither the city nor its officers can renounce this trust, disable themselves from performing their public duties, or so divert or impair these utilities that they are rendered inadequate to

Same—Utilities Created for Public Purposes.

the complete performance of the trust under which they are held. Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 51 Fed. 309, 317, 2 C. C. A. 174, 231, 10 U. S. App. 98, 175, and cases there cited. But it is equally true that municipalities and their officers have the power, and it is their duty, to apply the surplus power and use of all public utilities under their control for the benefit of their cities and citizens, provided, always, that such application does not materially impair the usefulness of these facilities for the purposes for which they were primarily created. Union Pac. Ry. Co. v. Chicago, R. I. P. & Ry. Co., 51 Fed. 309, 321, 2 C. C. A. 174, 234, 10 U. S. App. 98, 180; City of St. Louis v. The Maggie P. (C. C.) 25 Fed. 202; State v. City of Eau Claire, 40 Wis. 533; Green Bay & M. Canal Co. v. Kaukauna Water-Power Co., 70 Wis. 635, 35 N. W. 529, 36 N. W. 828; Bell v. City of Platteville, 71 Wis. 139, 36 N. W. 831; French v. Inhabitants of Quincy, 3 Allen, 9; Worden v. City of New Bedford, 131 Mass. 23; Camden v. Camden Village Corp., 77 Me. 530, 537, 1 Atl. 689; Brown v. Winnisimmet Co., 11 Allen, 326, 334; Midland Ry. Co. v. Great Western Ry. Co., 8 Ch. App. 841, 851; Simpson v. Hotel Co., 8 H. L. Cas. 712; Hendee v. Pinkerton, 96 Mass. 381, 386. This question was presented to this court and exhaustively argued by able counsel in Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., supra. In that case the Union Pacific Railway Company had leased to another company for 999 years the joint use of its bridge across the Missouri river and of its terminal facilities at Omaha, together with about seven miles of its track, and it was contended that this lease was beyond the powers of the corporation, and void, because it was a diversion of the use of its railroad facilities from the public purposes for which the railroad corporation held them. The contract was, however, sustained, because it appeared that the use leased was a surplus use remaining after the Union Pacific Railway Company had retained for itself sufficient facilities to perform all its public functions and to discharge all its public duties. This court held, after careful consideration, and its decision was subsequently affirmed by the supreme court (Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265), that, if a corporation necessarily acquires for the conduct of its corporate business facilities whose entire capacity is not needed for its corporate use, it is not required to hold them in idleness; but it has the power, and it is its duty, alike to its stockholders and the public, to lease or otherwise apply the surplus use for their benefit. In State v. City of Eau Claire, 40 Wis. 533, and Green Bay & M. Canal Co. v. Kaukauna Water-Power Co., 70 Wis. 635, 35 N. W. 529, 36 N. W. 828, the supreme court of Wisconsin held that, where a city had legislative authority to erect a dam for the purpose of waterworks for the city, it might lawfully lease for private purposes any excess of water not required for its waterworks This is a just and

easonable rule. It is a rule inconsistent with no principle of aw or of equity, and in accord with that common sense and ommon business practice which recognize as a public good he growth of two blades of grass where but one grew before, nd the conversion of waste to use. The case in hand falls ar within the rule. By the contract of September, 1898, the ity renounced no trust that had been imposed upon it. It isabled itself from the discharge of no duty. It in no way mpaired the usefulness of the water or of the water system of he city for the public purposes for which it was constructed nd maintained. On the other hand, that contract expressly rovided that the water diverted by the grantees under it hould be returned to the water system of the city unimpaired, ithout pollution or diminution of its flow, and that the gran-ees should do nothing under it which should interfere in any ay with the successful operation of the waterworks of the ity. Every use of those waterworks and of the water requi-ite to the discharge of the trust under which they were held or the usual municipal purposes was retained by the city nimpaired, while the idle power therein which was running o waste was wisely utilized, not for private use, but for the ublic purpose of enlarging the waterworks of the city, of in-reasing its supply of water, of procuring conduits and poles o carry its wires, and of obtaining electric light and power for ts public buildings and its streets. The ordinance and the ontract, therefore, were not void on the ground that the water ystem and the water were held by the city in trust to ex-inguish fires, to distribute to its inhabitants for domestic uses, nd for other municipal purposes, and on the ground that the unicipality had no power to divert them to generate lectricity for private use, because every use of the water and f the waterworks for which they were held in trust was ex-ressly retained by the city unimpaired, because the grant in he ordinance was made for public purposes, and not for private se, and because that grant wisely utilized an idle water power or the benefit of the city and its inhabitants, without impairing he uses for which the water system was constructed and naintained.

Another argument of counsel for the appellee was that the ortion of the ordinance which grants rights and privileges utside the limits of the city is void, because the city council has no power over that portion of the water system which is not specially given by legislative nactment. But, if the premise of this argument is sound, the onclusion does not follow, because the statutes which we ave already quoted give ample power to the city council to rant the rights and privileges in that portion of the water-works and of the water beyond the limits of the city which were conveyed by the ordinance. 2 Mills' Ann. St. §§ 4492, 4403, par. 68.

Same.

This concludes the discussion of all the arguments pre-

sented by counsel for the city in support of their contention that the contract of September 8, 1898, was beyond the powers of the city and of its council. For the reasons which have been stated, these arguments have not proved convincing or persuasive. In the answer of the city some other reasons were stated for the contention which the city here maintains, but they are either unfounded in law or not established by the evidence, and, as counsel for the city have deemed them unworthy of argument, they will not be discussed. Our conclusion is that the city council of Colorado Springs had the power to pass the ordinance and to make the contract of September, 1898, and that its subsequent attempt to repeal the former and to annul the latter, after the rights and privileges granted had become vested, was a violation of the constitution of the United States, and ineffectual for any purpose.

Finally, it is insisted that, if the contract was valid, the decree was right, because all rights and privileges under the ordinance were forfeited by the failure of Jackson to complete the tunnel within the time limited by the agreement. There is a provision in the contract that all the rights and privileges under it shall be forfeited by a failure to complete the tunnel by December 8, 1899. But another provision of the agreement is that if, for any cause for which the city is responsible, the work is materially delayed, then the time for the completion of the work shall be extended for a time equal to the aggregate length of the time of such stoppage or delays. Jackson drove the tunnel through the mountain within the time prescribed for its completion, and prosecuted his work vigorously and in good faith, but he did not reduce the tunnel to grade, or line it or finish it according to the specifications, within the time named in the contract. On the other hand, the city had repeatedly refused to pay him moneys that were due him for work which he performed in 1898, until he enforced payment by judgments of the courts. The city passed the repealing ordinance of February, 1899, answered this bill that its grant of 1898 was void, and so earnestly insisted upon its contention that it persuaded the court below to so hold. There is evidence that these wrongful acts of the city caused delay in Jackson's work, and that, in their absence, he would have completed the tunnel in time. This is the claim of the appellant. In our view, it is unnecessary to determine in this case whether or not that claim is well founded. This is not an action at law to enforce the forfeiture of this contract. This is a suit in equity to avoid the unlawful act of the city in attempting to annul its agreement. The claim of the city that the rights granted by it have been forfeited by delay in the performance of the agreement is presented by a supplemental answer. Whatever else may be the fact, this is certainly true: the great burden of the work of driving the tunnel had been

Contracts—Delay in Performance—Forfeiture—Enforcement in Equity.

e, and that work had been substantially done, when the of the time for its completion was reached. The sub- ial benefits of the contract, the essential consideration h induced the city to make it, either has accrued to it, or y will accrue to it. The tunnel has been driven. The now asks this court of equity to relieve it of the burdens is contract while it retains this great and substantial fit. That prayer does not appeal with much force to the cience of a chancellor, and it cannot be granted here. her Jackson nor his assignee, the appellant, has committed wrong, or violated any rule of law or of equity, in their ngs, and the case presents no equitable ground for depriv- hem of the rights and privileges which were granted to ı under the contract, and which they have fairly earned ıe substantial completion of the great work they under- . "A court of equity can act only on the conscience of a r. If he has done nothing that taints it, no demand can :h upon it, so as to give any jurisdiction." Boone v. es, 10 Pet. 177, 210, 9 L. Ed. 388; Illinois Trust & Sav- Bank v. City of Arkansas City, 76 Fed. 271, 293, 22 C. . 171, 193, 40 U. S. App. 257, 294, 34 L. R. A. 518; U. S. inona & St. P. R. Co., 67 Fed. 948, 960, 15 C. C. A. 96, 32 U. S. App. 272, 291; U. S. v. Northern Pac. R. Co., ed. 864, 880, 37 C. C. A. 290, 306.

ıe decree below is reversed, and the case is remanded to circuit court, with instructions to enter a decree for the llant for the relief prayed in its bill.

CITY OF SEATTLE

v.

HILL *et al.*

(*Supreme Court of Washington, Sept. 27, 1900.*)

[62 Pac. Rep. 446.]

ets—Common-Law Dedication—Existence of Statutory Provi-
***—The existence of statutory provisions on the subject does not ıde the making of dedications of land to the public for streets in lance with the established rules of the common law.**

ıe—Same—Intention and Acceptance.—The intention to make a dedication may be implied from acts of the owner of the land; n acceptance of the land by the public may be either express or ed.

ıe—Same—Acceptance—Authority of Municipal Officers.—Munici- fficials charged with the care and control of highways, who are

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e notes at end of case.

vested with authority to lay out and open streets, have, *ex officio*, authority to accept dedications of land for streets.

Same—Same—Sufficiency of Evidence.—The owner of the land exhibited to the common council of the plaintiff city a plat purporting to represent an addition to the city, upon which was marked the street in question, with contiguous lots and blocks appropriately designated thereon, and asked the common council to approve the same, and the council approved the same, and caused such approval to be entered in the records of the proceedings. And such owner, with others, presented a petition in writing to the council soliciting that body to grade such street, and construct sidewalks thereon, and such work was done in accordance with the petition. *Held*, that there was a complete common-law dedication, which after such acceptance thereof, precluded the dedicator and his grantors from asserting any ownership in the land inconsistent with its use as a public street; and that the fact that such plat was not recorded as required by statute, and therefore did not, of itself, operate as an effectual statutory dedication, was immaterial in this connection.

Local Assessments—Effect of Harmless Irregularities.—A local assessment will not be declared invalid for mere irregularities in the proceedings not prejudicial to the property owner.

Same—Irregularities—Estoppel.—After a person has signed a petition for a local improvement, which can only be paid for by means of an assessment on contiguous property, he, and those claiming under him who acquired their titles when the assessment was on record, are estopped from contesting the validity of the assessment, on the ground of mere irregularities, in the assessment proceedings, especially after the work has been completed and accepted by the proper authorities.

Same—Same—Actions to Enforce—Interest and Penalties—Charter Provision.—As the assessment proceedings in question were not entirely regular, there should not have been included in the recovery in an action to enforce assessment made therein the interest and penalty specified in the provision of the city charter providing that "if the assessment proceedings shall appear to be regular, the plaintiff shall be entitled to include in the recovery the full amount of the assessment and interest thereon * * * , from the time when the assessment shall have become delinquent, and five per cent. additional as penalty and damages for delay."

Appeal from superior court, King county; E. D. Benson, Judge.

Action by the city of Seattle against Alice S. Hill, as executrix, and others. From a decree in favor of plaintiff, defendants appeal. Modified.

Bausman, Kelleher & Emory, for appellants.

Pratt & Riddle and W. E. Humphrey, for respondent.

Anders, J. In compliance with a petition presented by property owners, the city of Seattle caused Washington street

to be graded, and sidewalks to be constructed thereon, from Twelfth to Sixteenth street, in said city. The work was done by contractors, and the cost of the improvement was assessed against the property abutting upon that portion of the street so improved. This action was brought to enforce the collection of the assessment levied against the property of appellants for their proportion of the expense of said improvement. Upon the trial in the superior court a decree was rendered in favor of the city, establishing a lien upon the property described in the complaint, for the whole amount of the assessment, together with the penalty and interest provided for by the city charter, and ordering a sale of the premises to satisfy the same. From this judgment and decree the defendants appealed.

Case Stated.

It is contended by the learned counsel for the appellants that the assessment was void ab initio, for the reason that the city council never acquired jurisdiction to levy it. This alleged want of jurisdiction is predicated upon the assumption that the land which was graded and improved as a street was at the time the private property of one W. C. Hill, and had not been laid out or traveled as a street, or dedicated to the public for such purpose. And, if that assumption is in accordance with the facts presented by the record, it must be conceded that the city was without power to levy the assessment complained of, and that the whole proceeding in that respect was null and void. The power of the city as to grading streets and constructing sidewalks is defined in section 8 of the charter as follows: "The city of Seattle shall have power to construct sidewalks, and to curb, pave, grade, macadamize and gutter any street or streets, highway or highways, alley or alleys therein, or any part thereof, and to levy and collect special taxes or assessments on all lots and parcels of land fronting on any such street or streets, alley or alleys, highway or highways, so improved, or any part thereof, sufficient to pay the expense of such improvement; and for such purpose may establish assessment districts, embracing all lots and parcels of land subject to assessment for such purposes. * * *" Laws 1885–86, p. 241. And from this provision it is manifest that the legislature did not undertake, or even pretend, to authorize the city to enter upon private property for the purpose of making improvements of this character. The first question, therefore, for determination is, was the locality where the improvement was made for which appellants' land was assessed a public street? Counsel for the respondent insists that it was, and the court below was evidently of that opinion. We are also of the opinion that the locus in question was a street, and that it became such by dedication by the then owner of the land. The facts upon which we base our contention are these: In the year 1889, W. C. Hill was the

owner of a tract of land containing 100 acres, the west boundary line of which constituted the eastern terminus of Washington street. During that year Mr. Hill made and acknowledged a plat designated as "W. C. Hill's Addition to the City of Seattle," and showing an extension eastward of Washington street through his 100-acre tract for the distance, at least, of one block, consisting of lots consecutively numbered. The lots on one side of the street, as extended, constituted block 1, and those on the other side block 13, according to the plat. The space between these two blocks was graded and improved as part of Washington street, and the assessment in question was levied on the several lots fronting thereon. It seems to have been Mr. Hill's purpose to sell the platted lots, but we find no evidence in the record showing that any of such lots were actually sold by him. This plat was not recorded in the office of the county auditor, and therefore did not, of itself, under our statute, operate as an effectual dedication to the public of the land delineated thereon as a street. But it does not follow that, because there was no statutory dedication in this instance, there was no dedication at all, for the provisions of statutes upon the subject do not preclude the making of dedications in accordance with the established rules of the common law. It is held by numerous authorities, and may be said to be an established principle of law, that "an incomplete or defective statutory dedication may, when accepted by the public, or when rights have been acquired thereunder by third parties, operate as a common-law dedication." 9 Am. & Eng. Enc. Law (2d Ed.) p. 36. See, also, Elliott, Roads & S. p. 86; Dill. Mun. Corp. (4th Ed.) § 628. There are two things which are absolutely essential to a valid common-law dedication, viz.: (1) An intention on the part of the owner to devote his land, or an easement in it, to a public use, followed by some act or acts clearly and unmistakably evidencing such intention; and (2) an acceptance of the offer by the public. In making a dedication, no particular formalities are necessary. The statute of frauds is not applicable in such cases, and therefore a deed or other instrument of writing is not necessary, though, of course, a dedication may be made by deed. The intention to make a dedication may be shown by particular acts of the owner, such as throwing open his land to public travel, or platting it, and selling lots with reference to the plat, or acquiescing in or positively assenting to its use by the public, or, in short, by any act positively and unequivocally indicating such intention. See Harding v. Jasper, 14 Cal. 642; Godfrey v. City of Alton, 12 Ill. 29. The acceptance by the public may be either express or implied. An express acceptance is evidenced by some formal order of the body or officer having jurisdiction in such matter accepting the dedication in express terms. Elliott, Roads & S. p. 115.

Streets—Common-Law Dedication—Existence of Statutory Provisions.

Same—Same—Intention and Acceptance.

And it may be stated as a general proposition that the officials who are charged with the care and control of highways, and who are vested with authority to lay out and open streets, have also authority to accept dedications of land for such purposes. 9 Am. & Eng. Enc. Law, p. 46. The authority to open, repair, and improve streets, alleys, and highways was conferred upon the city of Seattle by its charter, and, as the city council was the only body by which the authority could be exercised, it follows that it was empowered to accept dedications of streets on behalf of the public. An acceptance may be implied from acts of the proper public authorities showing that dedicated lands are considered and treated as public streets and highways. "Where control of a way is assumed by the authorities representing the public corporation, an acceptance will be implied." Elliott, Roads & S. p. 115. Applying the principles above stated to the facts of this case, it clearly appears that the land claimed to have been exclusively private property at the time it was graded and improved by the city was in fact a street by dedication. When the owner of the land exhibited to the common council a plat purporting to represent an addition to the city, and upon which there was marked the street involved in this controversy, with contiguous lots and blocks appropriately designated thereon, and asked the council to approve the same, we think he very clearly evinced an intention to dedicate the street to the public. And it is equally clear that when the common council formally approved the plat, and caused such approval to be entered in the records of its proceedings, they expressly signified their acceptance of the dedication of the street. But this is not all that was done in that regard. The owner of the land, with others, presented a petition in writing to the common council soliciting that body to grade this street, and construct sidewalks thereon; and in causing the work to be done in accordance with the petition the council recognized the existence of the street, and treated it accordingly; and those acts on their part, as we have seen, amounted to an acceptance of the dedication of the land for the purpose of a street. Upon acceptance the dedication became complete and irrevocable, and the dedicator and his grantees were thereafter precluded from asserting any ownership in the land inconsistent with its use as a public street. See Harding v. Jasper, supra; Godfrey v. City of Alton, supra; 9 Am. & Eng. Enc. Law, p. 34. If the deed made by Hill in 1892, by which he conveyed to appellant Snipes, without reservation, the tract of land of which the street was a part, had been executed before the acceptance and improvement of the street by the city, there would be much force in the argument that that transaction showed an intention on the part of Hill not to dedicate the land. But that deed did not defeat or revoke the dedication,

Same—Same—Acceptance—Authority of Municipal Officers.

Same—Same—Sufficiency of Evidence.

and the fact that Snipes subsequently laid off and platted the whole tract originally owned by Hill is quite immaterial, so far as this case is concerned.

It is further contended by the appellants that, even if there was a dedication of the street by Hill, the assessment was nevertheless null and void, for the reason that the provisions of the charter and of the ordinances upon the subject of assessments for street improvements were not pursued with sufficient strictness. But, while it is true that the record discloses some irregularities in the assessment proceedings, it does not appear that the owner of the land was prejudiced thereby, or that his property was not benefited to the extent of the assessment. It is clear that the common council possessed jurisdiction to order the improvement and levy the assessment, and it appears that all the notices required by the general ordinances to be given to property owners were published in the official newspaper of the city for the required time. In view of these facts, and of the provisions of section 10 of the charter, it would seem that the assessment was properly held valid "notwithstanding any defect, informality, or irregularity in the proceedings." And, besides, we are of the opinion that the appellants ought not to be heard to complain of defects and irregularities in the assessment proceedings. The party through whom they derived whatever title they have to the land was actively instrumental in inducing the proceedings which are now called in question, and it is not shown anywhere in the record that he ever made the slightest objection to the mode of levying the assessment, or the amount thereof, or even to the character of the work.

Local Assessments—Effect of Harmless Irregularities.

Same—Irregularities—Estoppel.

It is not necessary at this time to determine whether the mere failure on the part of one whose land is being assessed for a local improvement, and who has not himself requested the municipality to make it, to object to the proceedings at the proper time, will preclude him from afterwards objecting, as some courts seem to have held, for that question is not properly in this case. But we are constrained to hold that, after a person has signed a petition for an improvement, which can only be paid for by means of an assessment on contiguous property, he is estopped from contesting the validity of the assessment, especially after the work has been completed, and accepted by the proper authorities. Cooley, Tax'n, p. 819; Ball v. Tacoma, 9 Wash. St. 592, 38 Pac. 133; Motz v. City of Detroit, 18 Mich. 495; Wood v. Norwood Tp., 52 Mich. 32, 17 N. W. 229; Ricketts v. Spraker, 77 Ind. 371; Patterson v. Baumer, 43 Iowa, 477; Ferson's Appeal, 96 Pa. St. 140; Elliott, Roads & S. 423. It will be seen from what we have said that at the time these appellants acquired their title to the land in controversy there was a valid assessment against it appearing of record, and of which they may be deemed to

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have had at least constructive notice. They received the benefits resulting from the improvement, and must be held to have taken the land subject to the consequent burden.

But in one particular the judgment of the learned trial court is erroneous. The charter under which this action is instituted, after providing for the collection of local assessments by action or suit, and specifying what is a sufficient statement of a cause of action, provides as follows: "In any such action or suit, if it shall appear to the court on the trial thereof that the work has been done, * * * in making improvements authorized by the council for which, under the provisions of this act, special assessments may be levied, the court shall decree against the premises and in favor of the city, * * * to the extent of the proportion of the reasonable value of such work * * * justly chargeable to such premises, notwithstanding any defect, informality or irregularity in the proceedings. But in such case, if defects, informalities or irregularities, prejudicial to the party objecting on account thereof, appear, the court, in its discretion, may disallow any part or the whole of the plaintiff's costs, or allow costs to the defendant; and if the assessment proceedings shall appear to be regular, the plaintiff shall be entitled to include in the recovery the full amount of the assessment and interest thereon at the rate of ten per cent. per annum, from the time when the assessment shall have become delinquent, and five per cent. additional as penalty and damages for delay." Laws 1885–86, p. 243. In this case it is not claimed that the amount of the assessment, if it is a valid one, is beyond the reasonable value of the work chargeable to the premises of the appellants, and therefore judgment was properly entered for the full amount of the assessment. But, inasmuch as the assessment proceedings were not entirely regular, the respondent was not entitled to include in the recovery the interest and penalty specified in the provision of the charter above quoted. The judgment and decree must therefore be modified by excluding therefrom the amount of the interest and penalty, and, as so modified, it must be affirmed. Costs will not be allowed to either party in this court.

Same—Same—Actions to Enforce—Interest and Penalties—Charter Provision.

Dunbar, C. J., and Reavis, J., concur.

NOTES.

Dedication—General Statement.—In Harding *v.* Jasper, 14 Cal. 642, the court says: "In dedication no particular formality is necessary; it is not affected by the statute of frauds; it may be made either with or without writing by any act of the owner, such as throwing open his land to public travel, or platting it and selling lots bounded by streets designated in the plat, thereby indicating a clear intention to dedicate; or an acquiescence in the use of his land for a highway, or his declared

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assent to such use, will be sufficient, the dedication being proved in most, if not all, of the cases by matter *in pais* and not by deed. The vital principle of the dedication is the intention to dedicate, and whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made. Time, therefore, though often a very material ingredient in the evidence, is not an indispensable ingredient in the act of dedication. If accepted and used by the public in the manner intended, the dedication is complete—precluding the owner and all claiming in his right from asserting any ownership inconsistent with such use. Dedication, therefore, is a conclusion of fact to be drawn by the jury from the circumstances of each particular case; the whole question, as against the owner of the soil, being whether there is sufficient evidence of an intention on his part to dedicate the land to the public use as a highway."

Same—Essentials.—In the leading case on this subject the following principles were established: (1) It is not essential that the owner shall part with the legal title to the land. (2) It is not necessary that there shall be any grantee *in esse*. (3) Nor is a deed or writing necessary but such dedication may be established by parol. (4) Such dedication does not depend on any specific length of enjoyment. It is only necessary for the owner to give his assent to the use of the land, and express or implied acceptance of such easement by the public. City of Cincinnati *v.* White, 6 Pet. 431; Barclay *v.* Howell's Lessee, 6 Pet. 498; New Orleans *v.* United States, 10 Pet. 662.

Owner Need Not Part with Legal Title.—New Orleans *v.* U. S., 10 Pet. 662; Kelsey *v.* King, 33 How. (N. Y.) Pr. 39; Barney *v.* Keokuk, 94 U. S. 324; Backus *v.* Detroit, 49 Mich. 110; Hunter *v.* Sandy Hill, 6 Hill 407; Dubuque *v.* Maloney, 9 Iowa 450; Brown *v.* Manning, 6 Ohio 298; Tinges *v.* Baltimore, 51 Md. 600.

Grantee in Esse.—Winona *v.* Huff, 11 Minn. 119; Doe *v.* Jones, 11 Ala. 63; McConnel *v.* Lexington Trs., 12 Wheat. 582. By operation of law, dedications of streets may pass to the public. Klinkener *v.* M'Keesport, 11 Pa. St. 444; Pella *v.* Sholte, 24 Iowa 283.

A dedication may be made by parol as well as by deed or other writing. State *v.* Catlin, 3 Vt. 530; Curtis *v.* Keesler, 14 Barb. 521; Harding *v.* Jasper, 14 Cal. 642; Waugh *v.* Leech, 28 Ill. 492; Kittle *v.* Pfeiler, 22 Cal. 489; Carter *v.* Portland, 4 Ore. 339; Dover *v.* Fox, 9 B. Mon. 200; Macon *v.* Franklin, 12 Ga. 248.

Such dedication must not be made to a part but to the whole public. Trustees, etc., *v.* Hoboken, 23 N. J. L. 13.

Acceptance.—In order to constitute a dedication the offer of dedication must be accepted either by user or some formal act of acceptance. Harding *v.* Jasper, 14 Cal. 647; San Francisco *v.* Calderwood, 42 Cal. 588; Hayward *v.* Manzer, 70 Cal. 476; People *v.* Williams, 64 Cal. 502; City of Galveston *v.* Williams, 69 Tex. 449; State *v.* Track, 6 Vt. 355; Gilder *v.* City of Brenham, 67 Tex. 345; Cook *v.* Harris, 61 N. Y. 448; Briel *v.* City of Natchez, 48 Miss. 423; Field *v.* Manchester, 32 Miss. 279; Hamilton *v.* Chicago, etc., R. Co., 124 Ill. 235; Fisk *v.* Town of Havana, 88 Ill. 208; Commonwealth *v.* Moorehead, 118 Pa. St. 344; Harper *v.* State, 109 Ala. 66; Lansburgh *v.* District of Columbia, 8 App. (D. C.) 10; New York, etc., R. R. Co. *v.* New Haven, 46 Conn. 257;

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ushy Mound *v.* McClintock, 150 Ill. 129; Madison *v.* Gallagher, 159 Ill. 5; Wilkins *v.* Barnes, 79 Ky. 323; White *v.* Bradley, 66 Me. 254; Pot- r *v.* Safford, 50 Mich. 46; St. Louis *v.* St. Louis University, 88 Mo. 5; Vossen *v.* Dautel, 116 Mo. 379; Bissell *v.* New York, etc., R. R. Co., Barb. 630; *Ex parte* Pittsburgh Alley, 104 Pa. St. 622; Tower *v.* Rut- nd, 56 Vt. 28; Commonwealth *v.* Kelly, 8 Gratt. 632; Boyd *v.* Wool- ine, 40 W. Va. 282; Mahler *v.* Brumder, 92 Wis. 477, 482.

Who May Dedicate.—The owner of the title to lands is the only person ho can make a valid dedication of such lands. Hoole *v.* Atty. Gen., 22 la. 190; Kyle *v.* Logan, 87 Ill. 64; Edwardsville *v.* Barnstock, 66 Ill. pp. 381; Venata *v.* Jones, 42 McLean 641; Gridley *v.* Hopkins, 84 Ill. 8; Hawthorn *v.* Myers (Ky.), 37 S. W. 593; Stacey *v.* Miller, 14 Mo. 8; Blodgett *v.* Royalton, 17 Vt. 40; Hobbs *v.* Lowell, 19 Pick. 405; win *v.* Dixon, 9 How. (U. S.) 10; Lee *v.* Lake, 14 Mich. 12; Leland *v.* ortland, 2 Ore. 188.

Same—Power of City.—A governor and judge authorized to make a at of a city, have no power to dedicate lands of private persons and attempt on their part to make such dedication will be invalid. People Jones, 6 Mich. 183; Robertson *v.* Wellsville, 1 Bond (U. S.) 81; U. S. Chicago, 7 How. 185; Clements *v.* West Troy, 16 Barb. 251.

But a city may make a valid dedication of its own lands. Story *v.* ew York Elev. Ry. Co., 90 N. Y. 122.

Same—Easement of Passage.—Where land is dedicated to the public r streets, an easement granting the right of passage on such streets all that is required and there is no transfer of the legal title to the il. Lade *v.* Shepherd, 2 Stra. 1004; St. Mary *v.* Jacobs, L. R., 7 Q. 47, 25 L. T. 800; Goodtitle *v.* Alker, 1 Burr. 133; Harrison *v.* Parker, East. 154; Every *v.* Smith, 26 L. J. Exch. 344; Perry *v.* New Orleans, c., R. Co., 55 Ala. 413, 28 Am. Rep. 740; Maywood Co. *v.* Maywood, 8 Ill. 61; Chicago, etc., R. Co. *v.* Joliet, 79 Ill. 25; Manly *v.* Gibson, Ill. 308; Freedom *v.* Norris, 128 Ind. 377; Dubuque *v.* Maloney, 9 wa 450, 74 Am. Dec. 358; Des Moines *v.* Hall, 24 Iowa 234; Campbell ounty Ct. *v.* Newport, 12 B. Mon. (Ky.) 540; Perley *v.* Chandler, 6 ass. 454, 4 Am. Dec. 159; Boston *v.* Richardson, 13 Allen (Mass.) 152; hite *v.* Godfrey, 97 Mass. 472; Bliss *v.* Ball, 99 Mass. 597; St. Anthony alls Water-Power Co. *v.* King Wrought-Iron Bridge Co., 23 Minn. 186; ummings *v.* St. Louis, 90 Mo. 259; Cohoes *v.* Delaware, etc., Canal Co., 4 N. Y. 397; Williams *v.* New York Cent. R. Co., 16 N. Y. 97, 69 Am. ec. 651; Jackson *v.* Hathaway, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263; erplanck *v.* New York, 2 Edw. Ch. (N. Y.) 220; Still *v.* Lansingburgh, Barb. (N. Y.) 107; Charleston Rice Milling Co. *v.* Bennett, 18 S. ar. 254; Pomeroy *v.* Mills, 3 Vt. 279, 23 Am. Dec. 207; Abbott *v.* Mills, Vt. 521, 23 Am. Dec. 222; Benn *v.* Hatcher, 81 Va. 25, 59 Am. Rep. 645; ilwaukee *v.* Milwaukee, etc., R. Co., 7 Wis. 85. See also, Downend *v.* ity of Kansas City, 4 Mun. Corp. Cas. 238, and *notes*.

Dedication May Be Express or Implied.—A user of twenty years is ot essential to establish a dedication, but the owner of land may dedi- ate it as a public highway without deed. Stacey *v.* Miller, 14 Mo. 478.

Intention to Dedicate.—A clear intention of the owner to dedicate and reliance on such intention by the public is all that is necessary to a alid dedication of lands. State *v.* Trash, 6 Vt. 355; Banks *v.* Ogden, 2

Wall. 57; Sargeant *v.* State Bank (Ind.), 4 McLean 339; Abbott *v.* Mills, 3 Vt. 521; Macon *v.* Franklin, 12 Ga. 248; Dubuque *v.* Maloney, 9 Iowa 460; Logansport *v.* Dunn, 8 Ind. 378; Fairfield *v.* Morey, 44 Vt. 239; Pierpoint *v.* Town of Harrisville, 9 W. Va. 215; Mayor of Madison *v.* Booth, 53 Ga. 609; Morgan *v.* Railroad Co., 96 U. S. 716; Fisk *v.* Havana, 88 Ill. 208; Illinois Ins. Co. *v.* Littlefield, 67 Ill. 361; Rees *v.* Chicago, 38 Ill. 322; Marcey *v.* Taylor, 19 Ill. 634; Mausur *v.* State, 60 Ind. 357; Mausur *v.* Haughey, 60 Ind. 364; Grube *v.* Wells, 34 Iowa 148; McCormick *v.* Baltimore, 45 Md. 512; Mayor of Jersey City *v.* Morris, etc., Co., 12 N. J. Eq. (Beas.) 547. Mere intention to dedicate lands will not amount to a dedication of such lands, nor are acts of a strictly private nature to be taken as evidence of such dedication. Vick *v.* Vicksburg (Miss.), 1 Howard 379.

Dedication by Prescription.—It is generally held that a general, adverse, uninterrupted user of a highway for such a length of time as will bar real actions, will constitute a dedication by prescription. The following cases are authority: Harper *v.* State, 109 Ala. 66; Brushy Mound *v.* McClintock, 150 Ill. 129; State *v.* Tucker, 36 Iowa 485; State *v.* Green, 41 Iowa 693; Total *v.* Bonnefoy, 123 Ill. 653; Alcorn *v.* Sadler, 71 Miss. 634; Western Ry. *v.* Alabama, etc., R. R. Co., 96 Ala. 272; Onstott *v.* Murray, 22 Iowa 457; State *v.* Welpton, 34 Iowa 144; Lewiston *v.* Proctor, 27 Ill. 414; Landers *v.* Whitefield, 154 Ill. 630; Veale *v.* Boston, 135 Mass. 187; Pillsbury *v.* Brown, 82 Me. 450, 454; State *v.* Proctor, 90 Mo. 334; Prudden *v.* Lindsley, 29 N. J. Eq. 615; Davenpeck *v.* Lambert, 44 Barb. 596; Click *v.* Lamar County, 79 Tex. 121.

Dedication by User.—The following cases are authority for the different periods of time, necessary to establish a dedication by user: Ward *v.* Folly, 5 N. J. L. 482; Thayer *v.* Boston, 19 Pick. 511; State *v.* Biglow, 34 Me. 243; Brock *v.* Chase, 39 Me. 300; Hart *v.* Trustees, 15 Ind. 226; Day *v.* Allender, 22 Md. 511; Davenpeck *v.* Lambert, 44 Barb. 596; Hutto *v.* Tindall, 6 Rich. 396; State *v.* Hunter, 5 Ired. 369; Harper *v.* State, 109 Ala. 66; Debolt *v.* Carter, 31 Ind. 355; Lewiston *v.* Proctor, 27 Ill. 414; Madison *v.* Gallagher, 159 Ill. 105; Pillsbury *v.* Brown, 82 Me. 450; Click *v.* Lamar County, 79 Tex. 121; Keyes *v.* Tait, 19 Iowa 123; State *v.* Wells, 70 Mo. 635.

WOOLLACOTT

v.

CITY OF CHICAGO.

(*Supreme Court of Illinois, Oct. 19, 1900.*)

[58 N. E. Rep. 426.]

Condemnation of Street—Effect as Dedication.*—The proviso in article 9, § 53, of the city and village act, passed as an amendment in 1891 (1 Starr & C. Ann. St. [2d Ed.] p. 779), authorizes the court, where prop-

*See City of Seattle *v.* Hill, *ante*, page 191.

erty has been condemned for public purposes, and has been taken possession of by the city or village, but has not been paid for, after two years from the judgment of condemnation, on motion of the owner of such property, to enter an order requiring the city or village to pay the amount of the judgment, with interest from the time of such taking, within a short day to be fixed by the court, and in default thereof to dismiss the proceedings, and enter a judgment in favor of the owner for interest from the day of such taking, and direct the issuance of a writ of possession in favor of such owner or his legal representatives or grantees. *Held*, that a judgment for interest can only be entered under such provision where a writ of possession is awarded, and that such writ cannot be granted in favor of an owner who has by his own act, since the entry of the judgment of condemnation, dedicated the property as a street, and by the sale of adjacent property with reference to such street estopped himself, as against his grantees, from claiming the same as private property.

Intention—Filing Plat of Property—Statutory Right of City.—Where an owner executed and filed a plat of property, designating a portion thereof as a street, which, under the statute, would operate as a dedication as effectually as a deed, the fact that proceedings had previously been instituted to condemn the property for street purposes in which a judgment of condemnation had been entered, but the award had not been paid, does not negative an intention to make a voluntary dedication by the plat which will defeat the same, conceding such intention to be essential to a statutory dedication, because the owner is bound to know that under the statute the city may dismiss the condemnation proceedings, and especially where the owner had himself filed a motion for their dismissal, which was still pending and undetermined.

Same—Estoppel to Deny Intention.—Where an owner has executed, acknowledged, and filed a plat of his property, on which a certain portion is designated as a street, has sold lots to third persons with reference to such plat as fronting upon such street which they have improved, and the municipality has taken possession of and improved the street, he is estopped, both as against his grantees and the municipality, to deny his intention to make a dedication of the street.

Appeal from superior court, Cook county; Jones Hutchinson, Judge.

Proceeding by John S. Woollacott against the city of Chicago. From a judgment for defendant, petitioner appeals. Affirmed.

Case Stated.

This is a proceeding stated by counsel to be under section 53, as amended in 1891, of article 9 of the city and village act of 1872. The proceeding was begun by petition filed on March 24, 1900, nunc pro tunc as of March 8, 1899, setting forth the condemnation and supplemental assessment proceedings hereinafter mentioned; and also setting up the repealing of the ordinance of condemnation, and the vacation of the judgment of condemnation, and of the judgment affirming the special assessment, and the dismissing

of the petitions therein: and also setting up that the city has assumed the control and use of the property condemned without paying compensation or damage therefor: and praying that a judgment be entered in accordance with the terms of the statute in such cases made and provided, awarding interest on the amount of said judgment from the date of taking possession of said property by the city, and further directing the issuance of a writ of possession for said property in favor of the petitioner. On March 24, 1900, the court rendered a judgment, finding the issues for the respondent, the city of Chicago, and directing that the city recover of the appellant its costs and charges, and have execution therefor, to which the appellant excepted. The present appeal is prosecuted from the judgment entered, or finding made, on March 24, 1900, as aforesaid.

The facts are substantially as follows: On November 15, 1886, the board of trustees of the town of Lake View passed an ordinance for opening and extending Lake View avenue from the south line of St. James place to the north line of Fullerton avenue, the avenue as opened and extended to be of the width of 50 feet, and the east line thereof to be the east line of the S. W. ¼ of section 28, township 40 N., range 14 E. of the third principal meridian. On November 22, 1886, the town of Lake View filed in the superior court of Cook county its petition for the ascertainment of just compensation to be awarded to the owner or owners of property to be taken or damaged for the opening and extending of Lake View avenue as aforesaid. Among the property to be taken for said improvement, and described in said petition, was a strip of land 50 feet in width off the easterly line of lot 4 and off the south 27½ feet in width of lot 3, all in Assessor's division of lot 4 of Wrightwood, being a subdivision of said S. W. ¼. At that time William C. Goudy was the owner of the strip of land 50 feet in width as above described. On November 2, 1887, the jury returned a verdict awarding to the owner of said strip $5,000. On January 7, 1888, judgment of condemnation for $5,000 was rendered upon the verdict. At that time William C. Goudy was the owner of the whole of said lot 4 and of the south 27½ feet of said lot 3. At that time, also, David Goodwillie, or his wife, Cecelia Goodwillie, was the owner of lot 2 in said Assessor's division, and of said lot 3, except said strip of land 27½ feet in width off the southerly side of said lot 3.

A supplemental petition was filed under said section 53, praying that an assessment be made for the purpose of raising the amount necessary to pay the compensation and damages awarded for the property taken or damaged. In this supplemental proceeding the commissioners filed their assessment roll on January 21, 1888, and reported that lot 4, and the south 27½ feet of lot 3, except the east 50 feet thereof, was specially benefited in the sum of $4,628.75, being only $371.25 less than the condemnation judgment. December 3, 1888, the said as-

sessment roll and report were confirmed. Goodwillie and Goudy filed objections to the confirmation of the assessment, and took an appeal to this court from the judgment confirming the same. This appeal was finally disposed of on March 30, 1891, as may be seen by reference to the case of Goodwillie v. City of Lake View, 137 Ill. 51, 27 N. E. 15. After the filing of the original petition, the city of Lake View was substituted for the town of Lake View; and thereafter, on June 29, 1889, the city of Lake View became annexed to the city of Chicago, and the city of Chicago entered its appearance in said proceeding, and assumed the direction and control of the proceedings of condemnation and supplemental assessment. Said lots 2, 3, and 4 are long lots, running east and west, and extending eastward from North Clark street to Lincoln Park.

While the appeal from the judgment of confirmation was pending, Goudy and Goodwillie made a new subdivision of said lots 2, 3, and 4, known as "Goudy & Goodwillie's Subdivision of Lots 2, 3, and 4 in Assessor's Division of lot 4," etc. By this subdivision, a street called "Roslyn Place" was made to run east and west, and north of the property owned by Goudy; and said lot 4, and the south 27½ feet of said lot 3, so as aforesaid owned by him, were subdivided into lots numbered from 18 to 33, inclusive. Of these lots, lots numbered from 18 to 30, inclusive, ran north and south, and fronted on Roslyn place, while lots numbered from 31 to 33, inclusive, ran east and west, and fronted on Clark street. In this subdivision lot 18 was the most easterly lot, and embraced the strip of land 50 feet wide mentioned in the condemnation judgment for $5,000. On November 6, 1890, Goudy and wife deeded to appellant, John S. Woollacott, for an expressed consideration of $75,000, said lots from 18 to 33, inclusive, of Goudy & Goodwillie's subdivision above named. This deed contains the following recital: "The covenants in this deed shall not apply to the west fifty feet of said lots 31, 32, and 33, and also proceedings for condemnation of said lot 18, and a special assessment for opening and extending Lake View avenue."

On March 19, 1892, appellant and Goodwillie filed a petition in the original suit above described, under section 53 of article 9 of the city and village act as amended in 1891, and therein described the proceedings for the opening and extending of Lake View avenue to the uniform width of 50 feet from the south line of St. James place to the north line of Fullerton avenue, as above set forth. Said petition so filed on March 19, 1892, stated that, although more than two years had elapsed since the entry of judgment in said proceeding, yet that no part of the lands of Goudy and Goodwillie, or of any of them, had been taken or damaged for said improvement or otherwise, and that no part of the several sums awarded to be paid for said lands had been paid for them or for any part thereof; and the petition prayed that the court would enter an order

that the city of Chicago should pay for said lands, so proposed and ordered to be taken, the said sums awarded therefor in said judgment, within a short day to be fixed by the court, not later than 20 days from the date of entering of such order, and that, in default thereof, the proceedings be dismissed, so far as the same related to the lands of petitioners, appellant, Woollacott, and said Goodwillie. The city of Chicago filed an answer to said petition of Woollacott and Goodwillie, and stated in said answer that the delay in the prosecution of the proceeding, if any, had been caused by Goudy and Goodwillie, who filed objections to the assessment, and took an appeal to the supreme court of the state, which was not finally disposed of until March 30, 1891, and that the order of the supreme court, affirming the judgment of confirmation, was not filed in the superior court until July 6, 1891. The answer averred that the assessment roll had been certified by the clerk of the court to the city collector of Chicago, who was proceeding to collect the same. The answer also averred that the total amount of the judgment of the superior court was $30,541, and that the total assessment against the property of Goudy and Goodwillie was $11,638, and that the assessment roll would be fully collected, in due process of law, on or before the 1st day of November. Some testimony was introduced in the present proceeding tending to show that on March 19, 1892, the same day on which the petition of appellant and Goodwillie was filed, the city of Chicago laid a water pipe in said strip of land 50 feet wide off the easterly line of said lot 4, and the south 27½ feet in width of said lot 3, designated on Goudy & Goodwillie's subdivision as lot 18. On October 29, 1892, while the petition of March 19, 1892, of appellant and Goodwillie was pending, the appellant, Woollacott, made and recorded a resubdivision of lots 18, 19, and 20, and the east 30 feet of lot 21 in Goudy & Goodwillie's subdivision of said lots 2, 3, and 4, and re-platted the same, naming lot 18 upon said plat as "Lake View (Boulevard) Avenue," 50 feet wide; and the balance of said subdivision was platted as lots 1, 2, 3, and 4, running east and west, and fronting on Lake View avenue as a street, and lots 5, 6, and 7, running north and south, and fronting north on Roslyn place as a street, a private alley being designated upon the plat as running north and south between lot 5 and the rear or west ends of lots 1, 2, 3, and 4. The answer of the appellee, the city of Chicago, to the present petition filed by appellant, contains the following averment: "The respondent says that the making of said plat by said Woollacott was and is a voluntary dedication of said lot 18 to the public, and to the city of Chicago, and to the persons to whom he subsequently sold and conveyed the said lots 1 to 7, inclusive."

On May 1, 1893, the appellant sold to Alice D. Foster said lot 3, in Woollacott's resubdivision above described, which fronts on said lot 18, marked on the plat as "Lake View

Avenue." Upon lot 3 so sold to Alice D. Foster there has been constructed a brick and marble residence. On or about May 1, 1893, appellant constructed buildings on lots 1, 2, and 4 and lots 5, 6, and 7 in said resubdivision aforesaid, lots 1, 2, and 4 fronting on said lot 18, designated on the plat as "Lake View Avenue." In 1894 appellant conveyed lots 1, 2, and 4, fronting on Lake View avenue, and lots 5, 6, and 7, fronting on Roslyn place, to the Commercial National Bank of Chicago, or its cashier, John B. Meyer. This quitclaim deed to Meyer was executed as a mortgage security, and was foreclosed, and the master's deed executed to the bank in September, 1896, followed by a deed executed to the bank by the appellant himself on March 20, 1897. On November 27, 1893, the city passed an ordinance for the erection of lamp posts on Lake View avenue from Roslyn place, south of Arlington place, to be so erected under the superintendence of the department of public works. On February 14, 1894, the city council of Chicago repealed the ordinance of November 15, 1886, for the opening and extension of Lake View avenue to the uniform width of 50 feet from the south line of St. James place to the north line of Fullerton avenue. On February 28, 1894, upon motion of the city attorney, an order was entered that the judgment of condemnation, entered on January 7, 1888, and all other judgments, rendered in said original proceeding, be, and were thereby, vacated and set aside, and the assessment roll filed therein annulled, and the petition dismissed, and the cause stricken from the docket of the court. On May 4, 1896, the city council of Chicago passed an ordinance for paving and curbing the roadway of Lake View avenue from the south line of Roslyn place to a point 173 feet south of the south line of Arlington place. Lake View avenue was paved and curbed by the city in accordance with said ordinance. Previously to the middle of November, 1898, the Commercial National Bank had sold and conveyed the lots and buildings so deeded to it by appellant to other persons. When appellant began to construct the houses fronting on what was lot 18 in Goudy & Goodwillie's subdivision, and what was marked as "Lake View Avenue" on the plat of appellant's resubdivision, appellant appropriated from six to eight feet of the west side of said lot 18 for sidewalks for the houses so fronting on lot 18.

Hamlin & Boyden and James J. Barbour, for appellant.

Charles M. Walker, Corp. Counsel, and Thomas J. Sutherland, for appellee.

Magruder, J. (after stating the facts). The proviso to section 53 of article 9 of the city and village act, passed as an amendment in 1891, is as follows: "Provided, however, in all proceedings heretofore commenced, where the property has not been fully paid for; or that shall hereafter be commenced, said city or village shall take and pay for the lands sought to be taken or damaged within two years of the entry of judgment in such condemnation proceedings. And after the expiration

of such time the court in which the proceedings may have been had, upon a motion of any person interested in the lands, may inquire in a summary manner whether the lands in which such person is interested have been taken or damaged and paid for; and if the court finds that such lands have not been taken or damaged and not been paid for, it shall enter an order requiring the city or village to pay for such lands within a short day, to be fixed by the court; and in default thereof shall dismiss such proceedings as far as they relate to lands of such person. If, however, the court finds that such city or village has taken possession of the land and has not paid therefor, it shall enter an order requiring such city or village to pay the amount of the condemnation judgment, with interest from the time of such taking, within a short day to be fixed by the court; and in default thereof, to dismiss the proceedings and enter a several judgment in favor of such land owners for interest from the day of such taking, and direct the issue of a writ of possession in favor of the several owners of their legal representatives or grantees, respectively. And such dismissal as aforesaid shall operate as a bar to further proceedings under such ordinance against the land affected by such dismissal. And every such cause shall be considered as pending in the court in which the same has been, or shall be commenced, until all the lands sought to be taken are paid for, or until the proceedings are dismissed where the lands have not been taken." 1 Starr & C. Ann. St. (2d Ed.) p. 779.

The proviso above quoted provides for the making of a motion by any person interested in the land. In this case appellant did not make a motion, as specified in the proviso to section 53, but filed a regular petition in the condemnation and assessment proceeding, to which petition appellee, the city of Chicago, filed an answer. Upon the petition of appellant, so filed nunc pro tunc as of March 8, 1899, and the answer of appellee thereto, an issue was made, testimony was taken before the court, and propositions of law were submitted to the court. We deem it unnecessary to decide whether, under a statute which provides for the making of a motion by a person interested in the property involved, and confers upon the court before whom the motion is made the power to make an inquiry in a summary manner, parties may proceed to file a petition and answer, and take testimony, and try an issue thus formed, as though an original case was pending in court. The statute evidently contemplated nothing but the making of a mere motion, to be disposed of by the court in a summary manner. As, however, both parties have in this proceeding presented the matter as an issue formed upon pleadings, and proofs taken, and propositions of law submitted, we will consider the points involved without reference to the propriety of the course pursued.

The petition filed by the appellant upon March 24, 1900, nunc pro tunc as of March 8, 1899, prays for a judgment award-

ing interest upon the amount of the judgment of condemnation for $5,000 from the date of the alleged taking possession of the property sought to be condemned by the city, and also directing the issuance of a writ of possession for said property in favor of appellant. It is impossible to see how the prayer of this petition could have been granted by the court below. The statute not only provides for a judgment in favor of the landowner for interest from the date of taking possession, but it also provides for the issuance of a writ of possession in favor of the several owners, or their legal representatives or grantees, respectively. The property which the appellant asks to be put in possession of through a writ of possession is a part of Lake View avenue, a public street of the city of Chicago. It is the same property which was lot 18 in Goudy & Goodwillie's subdivision, and which, in the original condemnation proceeding, is described as a strip of land 50 feet wide off the easterly side of lot 4, and off the south 27½ feet in width of lot 3, in Assessor's division of lot 4 of Wrightwood. Lots 1, 2, 3, and 4 of appellant's resubdivision, which are parts of lots 19 and 20 of Goudy & Goodwillie's subdivision, front, with the buildings erected thereon, upon this portion of Lake View avenue, formerly designated as lot 18. Lots 1, 2, 3, and 4, with the buildings thereon, which thus front upon this portion of Lake View avenue, are not now owned by the appellant, but by grantees from the appellant. These grantees are not parties to this proceeding. The appellant could not hold the portion of Lake View avenue upon which these lots and buildings front, as against his grantees, the owners thereof, because he sold the lots and buildings to them with the understanding that their property was to face upon this street. They thereby became vested with an easement in the street for the purposes of ingress to, and egress from, their property. Then court below could not ignore the rights of these grantees, and make an order which should put the appellant in possession of the street in front of their property. Appellant, not being entitled to the possession of the strip of land known as "Lot 18," is not entitled to interest on the judgment. The two, interest on the judgment and possession of the property, go together under the statute, and there is no authority for awarding interest money where possession does not go with it.

Condemnation of Street—Effect as Dedication.

Appellant, on October 29, 1892, made a resubdivision of lots 19, 20, and the east 30 feet of lot 21 of Goudy & Goodwillie's subdivision, and platted the same, and marked upon said plat what had formerly been lot 18 as "Lake View Avenue," and recorded the plat. It is not denied in this case that the plat of this resubdivision was made, acknowledged, and recorded in strict compliance with the requirements of the statute. This being so, there was a statutory dedication to the city of Chicago of the property now in controversy, being that portion of Lake View

Intention—Filing Plat of Property—Statutory Right of City.

avenue on which lots 1, 2, 3, and 4, of appellant's resubdivision front.

Section 3 of chapter 109 of the Revised Statutes in regard to "Platts" provides that "the acknowledgment and recording of such plat shall be held in law and in equity to be a conveyance in fee simple of such portions of the premises platted as are marked or noted on such plat as donated or granted to the public. * * * And the premises intended for any street, alley, way, common or other public use in any city, village or town, or addition thereto, shall be held in the corporate name thereof in trust to and for the uses and purposes set forth or intended." 3 Starr & C. Ann. St. (2d Ed.) p. 2966. This court has held in a number of cases that, where a plat is executed, acknowledged, and recorded in conformity with the provisions of the statute, it will operate as effectually as a deed would operate to convey the title of the streets therein mentioned to the municipality. Village of Princeville v. Auten, 77 Ill. 325; Maywood Co. v. Village of Maywood, 118 Ill. 61, 6 N. E. 866; Rees v. City of Chicago, 38 Ill. 322; Gebhardt v. Reeves, 75 Ill. 301; Trustees v. Haven, 11 Ill. 554.

Same—Estoppel to Deny Intention.

Appellant contends, however, that dedication is a question of intention, and that he did not intend to make a dedication of the strip in question to the public. Counsel for appellant in their brief enumerate certain circumstances which, as they claim, show an intention not to make a dedication. The circumstance which is mainly relied upon in support of this position is the fact that the city had commenced a condemnation proceeding, had obtained a judgment for the condemnation of the strip in question, had assessed the balance of the property from which the street was to be taken for benefits derived from the improvement, and had filed an answer to the petition of March 19, 1892, saying that such assessment would be collected. Appellant insists that he was entitled to rely upon the condemnation of the property by the city for a street, and that, therefore, his making, acknowledging, and recording the plat of his resubdivision did not indicate an intention to dedicate the strip in question, but merely an intention to prepare for and take advantage of the proposed action of the city in the condemnation proceeding. Under the law the city had a right to dismiss its proceeding, and vacate the judgment, and appellant was bound to know the law in this respect. He filed a petition on March 19, 1892, reciting that the city had not taken possession of the strip in question, and asking that the city be required to pay the sum awarded for the strip within a short day to be fixed by the court, and that, in default of such payment, the proceeding should be dismissed, so far as the same related to the appellant's land. It thus appears that in March, 1892, the appellant himself asked for a dismissal of the petition in case of failure to pay the amount of the award within a short time. After filing his petition on March 19,

1892, appellant took no further steps therein, nor, so far as the record shows, ever called the matter to the attention of the court. He never obtained from the court an order that the city be required to pay the award within a fixed time. The laying of the water pipe in the strip in question took place on March 19, 1892, the very day on which appellant filed his petition. He did not frame the petition upon the theory that the city was in possession of the property, but upon the theory that the city had not taken possession. The construction of the water pipe would not make the city "liable to an amount found as the value of the premises for purposes of a street." Pearce v. City of Chicago, 176 Ill. 152, 52 N. E. 27. If the laying of the water pipe, however, was an act of possession, appellant must have had notice of it at the time of the filing of his petition or shortly thereafter; but he made no motion to amend the petition, and to allege the fact that possession had been taken of the strip, and that he was entitled to a writ of possession. On the contrary, the proceeding begun on March 19, 1892, was allowed to drag along without any action whatever on the part of the appellant, until the city itself, in February, 1894, repealed the ordinance, vacated the judgment, annulled the assessment, and dismissed the petition. This dismissal of the proceeding was the very result for which the appellant prayed in his petition of March 19, 1892. He took no further proceedings towards the enforcement of the judgment or the obtaining of possession until after a lapse of more than five years after February, 1894, when the city dismissed the proceeeding, to wit, until March 8, 1899, when he filed the present petition, under section 53 as amended.

When appellant made and recorded the plat of his resubdivision on October 29, 1892, it may as well be presumed that he did so in reference to the future dismissal of the condemnation and assessment proeeding as that he did so in reference to any expected consummation of that proceeding by the city. When the condemnation and assessment proceeding was dismissed and ended, the city had no right to take possession of the strip in question, except by virtue of the dedication which he made by the filing and recording of his plat. City of Chicago v. Hayward, 176 Ill. 130, 52 N. E. 26.

It is true that dedication is a question of intention, though this rule applies more particularly to common-law dedications (City of Chicago v. Stinson, 124 Ill. 510, 17 N. E. 43; Town of Lake View v. Le Bahn, 120 Ill. 92, 9 N. E. 269) than to statutory dedications, where the execution and recording of the plat in conformity to the statute vest the title to the streets or other public property in the municipality, just as a deed would vest it. We do not, however, hold that the question of intention has no application to the filing and recording of statutory plats. It may be conceded, for the purposes of this case, that the question of intention applied as well to dedication by statutory plats as to dedications at common law, and yet it is

settled law that the acts and declarations of an owner of property may be such as to equitably estop him from denying an intention to dedicate. Waggeman v. Village of North Peoria, 155 Ill. 545, 40 N. E. 485; City of Ottawa v. Yentzer, 160 Ill. 509, 43 N. E. 601. We think that the facts and circumstances developed in this case are of such a character as to estop the appellant from denying an intention to dedicate this strip of land to the public for a street.

Where an owner of land plats it, and sells lots bounded by streets, designated upon the plat as streets, he thereby indicates a clear intention to dedicate. Ang. & D. Highw. (2d. Ed.) § 142; 9 Am. & Eng. Enc. Law (2d Ed.) p. 34. Where an owner has made a plat, and sold parts of the land platted with express reference to the plat, it will be presumed that he intended to dedicate the parts designated for public uses to such public uses. The dedication, evidenced by the filing or recording of a plat, becomes complete when lots have been sold with reference to the plat, and the public has accepted the dedication either expressly or by user. 9 Am. & Eng. Enc. Law (2d Ed.) pp. 41–60, inclusive. The owner is estopped to deny dedication where private rights have intervened. Littler v. City of Lincoln, 106 Ill. 353. Where lots are sold according to the plat, the purchasers of lots acquire the right to have the streets delineated upon the plat kept open. 9 Am. & Eng. Enc. Law (2d Ed.) p. 57; Field v. Barling, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406. The act of the owner in platting, etc., is in the nature of a mere offer to the municipality, and the municipality cannot be bound to open or to improve the streets designated upon the plat until there is an acceptance by such municipality. Littler v. City of Lincoln, supra; Hamilton v. Railroad Co., 124 Ill. 235, 15 N. E. 854; Woodburn v. Town of Sterling, 184 Ill. 208, 56 N. E. 378.

An application of the principles, announced in the authorities above referred to, to the case at bar makes it clear that appellant is here precluded and estopped from denying an intention to dedicate. This estoppel not only here operates in favor of the private owners to whom he has sold property abutting upon the street in question, but it also operates in favor of the city of Chicago by reason of its acts of acceptance. The appellant so platted his lots as to make them front upon the street in question, and then built buildings upon his lots, and sold the lots and buildings to third persons. He also built sidewalks in front of the houses and lots so sold and upon the strip of ground in question. These acts on his part, in connection with the execution and recording of the plat in question, estop him from denying an intention to dedicate. The proof shows that in November, 1893, the city passed an ordinance for the erection of lamp posts upon the strip in question, and in May, 1896, passed an ordinance for paving and curbing the street in question, and did so curb and pave it in accordance with the ordinance. These acts on the part of the city, performed,

as they were, after appellant had recorded the plat of his resubdivision, indicate an acceptance of the street thereon designated as "Lake View Avenue." The testimony tends to show that such acts on the part of the city were not done for the purpose of taking possession under the condemnation judgment, because the condemnation proceeding was vacated and dismissed. Without a condemnation, the city had no right to take possession, but would have been a mere trespasser. City of Chicago v. Hayward, 176 Ill. 130, 52 N. E. 26; Pearce v. City of Chicago, 176 Ill. 152, 52 N. E. 27. The acts which appellant interprets as a taking of possession by the city under the condemnation judgment are rather to be regarded as acts of acceptance by the city of the offered dedication indicated by the plat. The appellant might have had a right to withdraw the offer of dedication made by the filing and recording of his plat, but he attempted no such withdrawal until after the intervening of private rights and the acceptance of the city. We are of the opinion that the court below committed no error in refusing to enter an order in favor of the appellant for interest upon the amount of the condemnation judgment and for a writ of possession to put him in possession of the strip in question. Accordingly the judgment of the superior court of Cook county is affirmed. Judgment affirmed.

ADDYSTON PIPE & STEEL CO.

v.

CITY OF CORRY.

(*Supreme Court of Pennsylvania, July 11, 1900.*)

[46 Atl. Rep. 1036.]

Limitation of Indebtedness—Time Contracts.*—If the contracts of a municipal corporation do not overreach its current revenues, and are otherwise valid, no objection can lawfully be made to them, however great the indebtedness of the municipality; and if means are adopted in good faith, which, according to reasonable expectation, will produce a sufficient fund, a contract entered into on the faith of them should not be held unlawful on account of an unintentional miscalculation, or an accidental and unexpected failure to produce the full result.

Appeal by plaintiff from court of common pleas, Erie county.

Action by the Addyston Pipe & Steel Company against the city of Corry on certain orders. Judgment for defendant, and plaintiff appeals. Reversed.

*See State *ex rel.* Helena Water Works Co. *v.* City of Helena *et al.*, [illegible] 39

C. Geo. Olmstead and J. W. Sproul, for appellant.

Albert B. Osborne, for appellee.

Mitchell, J. The city of Corry formally contracted for the building of a sewer; the contractor performed the work; the city accepted it, and is in possession; but it now seeks to escape payment on the ground that its contract was ultra vires. If this is true, the overruling requirements of public policy compel us to hold the defense good in law, however unjust and dishonest in morals. But the invalidity of the contract should be clearly established, and the burden of showing it is on the city. This being a case stated all facts not contained in it must be assumed not to exist, and the consequences must fall on the party having the burden of proof. The contract called for the building of a sewer for the price of $57,000, $9,300 of which was to be paid out of the general sewer fund, and the remainder to be assessed upon the property benefited by the contemplated sewer. The city, by ordinance, appropriated the $9,300 out of the general sewer fund, and it was duly paid, so that it is only material to the present inquiry so far as it may bear upon the validity of the contract at the time it was made. By ordinance and proceedings in court, the rest of the contract price was duly assessed upon the property benefited, including that which abutted on the line of the sewer, and some that did not. The city collected all of the assessments of the former class, and many of the latter, and has paid out all the orders on the treasurer given to the contractor, so far as the funds collected would go. But, some owners of nonabutting property having resisted payment, the assessments of that class were held invalid, and, the funds not being produced from the expected source, payment of the outstanding orders was refused, and the holder brought this suit upon them.

At the date of the contract, in 1891, it is admitted that the debt of the city of Corry was in excess of its constitutional limit, but, several years having been consumed in the building of the sewer, the debt meanwhile had been so far reduced that the balance due on this contract could be paid without transgressing the constitutional restrictions. On this point, however, the court below rightly held that the validity of the contract must be determined as of the time it was made. The question, therefore, is, did this contract increase the debt of the city of Corry at the date of its execution? As to the $9,300 to' be paid by the city out of the general sewer fund, there is nothing in the case stated to show that the amount was not then in the city treasury, or payable and subsequently paid out of the current revenues. This item, therefore, did not increase the city's indebtedness in the prohibited sense. There is no constitutional restriction on municipal expenditure, provided it is paid as it goes. What is prohibited is the incurring of debt. If the city has

he money on hand, or provides, at the time, a present means f raising it, otherwise than by loan, it may contract for ex- enditure without restriction. In City of Erie's Appeal, 91 a. St. 398, Gordon, J., quoting from Grant v. City of Daven- ort, 36 Iowa, 396, says: "When a contract made by a munic- pal corporation pertains to its ordinary expense, and is, ogether with other like expenses, within the limits of its cur- ent revenues and such special taxes as it may legally and in ood faith intend to levy therefor, such contract does not con- titute the incurring of indebtedness, within the meaning of he constitutional provision limiting the power of municipal orporations to contract debts;" and he adds: "If the con- racts of municipal corporations do not overreach their current evenues, no objections can lawfully be made to them, how- ver great the indebtedness of such municipalities may be; for n such case their engagements do not extend beyond their resent means of payment, and so no debt is created." This s quoted with approval by our Brother Dean in Wade v. Oakmont Borough, 165 Pa. St. 479, 488, 30 Atl. 959.

It is not, however, always possible to adapt present action to uture results with absolute precision, and if means are adopted vhich in good faith, according to reasonable expectation, vill produce a sufficient fund, the contract entered into on the aith of them should not be held unlawful on account of an nintentional miscalculation, or an accidental and unexpected ailure to produce the full result. Thus, if a city, at the time f making a contract, levies a special tax, in good faith sup- osed to be adequate to meet it, but in consequence of fire or lood, or decline in values, the result is an insufficient fund, it annot be held that the contract, good at its inception, would hereby be made bad. The constitutional restriction was not ntended to make municipalities dishonest, nor to prevent hose who contract with them from collecting their just claims, ut to check rash expenditure on credit, and to prevent load- ng the future with the results of present inconsiderate ex- ravagance. In the present case the city of Corry provided he contract price of the sewer by an appropriation of money vhich, as already said, we must assume to have been in the reasury, and by assessments upon the property benefited. There is nothing to indicate that these assessments were not, n good faith and reasonable expectation, supposed to be dequate to produce the required fund, and offered and ccepted by the contracting parties in the mutual belief in heir validity. So far as they were upon abutting property, hey fulfilled their intended purpose. The distinction in regard o nonabutting property had not then been made, and was not n contemplation of either side. When it was determined that his part of the agreed means of payment would be unavail- ble, the loss should, in equity and justice, fall on the city, vhich has received the full consideration stipulated for, and o this extent paid nothing. The cases on this subject are con-

flicting. See Dill. Mun. Corp. (4th Ed.) §§ 480–482, and notes. They show that there is no disposition of the question which is wholly free from difficulty. We have preferred to follow the line which we think not inferior in just legal reasoning, while clearly superior in the honesty and justice of the result reached.

There is another view of this particular case which leads to the same conclusion. As already said, the building of the sewer occupied several years. During the progress of the work, differences arose in regard to payments, and in 1895 a compromise was agreed upon between the contractor and a committee of the city council, subsequently ratified by ordinance, whereby the outstanding orders in favor of the contractor were canceled, and new orders issued, against which the city stipulated that no defense should be made by it. Among such new orders are those now sued on. The validity of the assessments on nonabutting property was then undecided. The contractor agreed to furnish additional counsel and aid in the prosecution of a test case on this subject, and to abate the sum of $550 from his claim, should such suit be decided against the city. This compromise was carried out by the parties, except as to the payment of the orders involved in this suit. No reason is shown why it was not entirely valid and binding. The case stated does not show that the stipulated payments on these orders could not, at that time, have been made from money in the treasury or from current revenue, even if that fact had been a necessary element in the validity of the compromise. Judgment reversed, and judgment directed to be entered for the plaintiff for $6,000, with interest.

CITY OF CHICAGO

v.

BAKER.

(*Circuit Court of Appeals, Seventh Circuit, Jan. 2, 1900.*)

[98 Fed. Rep. 830.]

Streets—Vacation—Action for Damages—View by Jury—Judicial Discretion.* —In an action against a city for damages for the vacation of a street within the limits of certain railroads' rights of way, at the commencement of the trial, at the instance of defendant, the jury was sent to view the premises; and it was assigned for error that the court refused to direct a view of the entire work of the elevation of the tracks of the railroads for a certain distance, that the court unduly restricted the opening statement which should have been made by defendant's counsel

*See notes at end of case.

City of Chicago *v.* Baker

efore the jury's view of the premises was had, and that the court refused ermission to counsel or other representative of defendant to be present vith the jury at the time of the view. *Held*, that these were matters of udicial discretion.

Same—Same—Elements of Damage—Cul-de-sac.—In such an action, here may be a recovery for the making a mere cul-de-sac on one side of laintiff's abutting premises, and thereby cutting off egress and ingress vhich had pertained to such premises to and from a certain point of the ompass, leaving no immediate communication with the next cross street n that direction.

Same—Same—Same.—In such an action, although the vacation of the treet was ordered in connection with the elevation of the railroad racks, evidence to the effect that, after and by reason of the elevation f the railroad tracks, smoke, cinders, and dust in increased quantities ere blown upon plaintiff's premises, was improperly admitted, as the ity was liable to plaintiff only for the injury caused by the closing of he street, and the fact that it appeared from the testimony in defend- nt's behalf that the elevation of the tracks was indirectly a benefit to laintiff, by making it possible to establish subways near by, which ould be used in going to and from plaintiff's premises without incurring he dangers of a grade crossing, did not render such evidence admissible, t not being claimed that the elevation of the track was in itself a benefit o plaintiff's property.

In error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Thomas J. Sutherland, for plaintiff in error.

Morris St. P. Thomas, for defendant in error.

Before Woods, Circuit Judge, and Bunn and Allen, District Judges.

Woods, Circuit Judge. For the opinion delivered in this case when first here, see City of Chicago v. Baker, 58 U. S. App. 569, 30 C. C. A. 364, 86 Fed. 753. Some of the questions then decided are again brought forward, but, of course, are not open to reconsideration. Other questions, however, are presented. After the remand of the case, an amended declaration was filed, to which the city alone was made defendant, and by which damage was claimed only for the vacation of 21st street within the limits of the right of way of the Chicago, Rock Island & Pacific Railway Company and the Lake Shore & Michigan Southern Railroad Company. At the commencement of the trial, at the instance of the plaintiff in error, the jury was sent, in charge of a bailiff, to view the premises; and it is assigned for error that the court refused to direct a view of the entire work of the elevation of the tracks of the railroads named from 17th street to 63d street, that the court unduly restricted the opening statement which should be made by counsel for the plaintiff in error before the jury's view of the

Streets—Vacation—Action for Damages—View by Jury—Judicial Discretion.

premises was had, and that the court refused permission to counsel or other representative of the plaintiff in error to be present with the jury at the time of the view. These were matters of discretion, and, while we incline to think it the better practice that a representative of either party, if the privilege be asked, should be allowed to be present and witness the action and conduct of the jury in taking a view of premises, we are satisfied that in this instance no harm resulted from the refusal. The situation was so simple that a diagramatic representation would have been enough, without sending the jury out. The scope of the examination ordered, including, as it did, 21st street from the lake to the river, and other neighboring streets and the subways near the vacated portion, was certainly sufficient. To have required more would have been needless, and possibly misleading.

The important questions in the case concern the elements of injury which the jury were permitted to consider. In the amended declaration it is averred that prior to the alleged vacation a crossing of the streets and railroad tracks at grade had been maintained, so that pedestrians and vehicles and the public generally were able to cross at that point; that by reason of the premises large numbers of persons passed the land of the plaintiff, which in that way was accessible and in close proximity to the portion of the city west of the crossing; that upon the vacation of the street the railroad companies, with the consent of the city, built, and ever since have maintained, upon and across the entire portion of the street within their right of way, a structure of earth and stone of the height of ten feet, and have laid thereon their railroad track; and that by reason of the vacation of that portion of the street, and the construction and maintenance of the railway embankment, "the public, and all persons and vehicles, were and are absolutely excluded and prevented from using said street for the purpose of crossing said right of way, and the direct and easy access from and to the land of the plaintiff as aforesaid, to and from the portion of the city lying west of said right of way, was destroyed, and said land was and is thereby rendered difficult of access from the west, such access being now inconvenient and circuitous, thereby depreciating the value of said land, to the damage of the plaintiff $20,000." It is now contended that the injury so averred is limited to the interruption of travel upon the street, that no proof was made or evidence offered of injury of any other kind, and that the court, therefore, erred in refusing to direct a verdict of not guilty. In our former opinion, the rule was recognized that the cutting off of travel along a street is "a common injury, for which individual relief is not allowed"; and it follows that the allegation in the declaration that the travel on the street by the premises of the plaintiff was diminished, or wholly interrupted, and the evidence to that effect, if admissible for any purpose, were

Same—Same—Elements of Damage—Cul-de-sac.

unavailing as a cause of action or for the enhancement of damages; but it remains clear, both by the averments of the declaration and by the proofs, that the street was vacated, making on the north of the plaintiff's premises a mere cul-de-sac, and cutting off, as stated in that opinion, "egress and ingress which had existed to and from the west, * * * leaving no immediate communication with the next cross street in that direction." "In that respect, at least," it was then said, and so became the law of the case, "he suffered a special inconvenience in the use and enjoyment of his property, for which he should receive compensation." That seems to us to be in accordance with the decision in City of Chicago v. Burcky, 158 Ill. 103, 42 N. E. 178, 29 L. R. A. 568, which is a case not essentially different from this. See, also, Hohmann v. City of Chicago, 140 Ill. 226, 29 N. E. 671. It is to be observed, however, that the ingress and egress, the deprivation of which we declared special and actionable, pertained, not to the public who might pass upon the street if it had not been closed, but to the owner or occupants of the premises. The damage attributable to such deprivation ordinarily can be estimated by no certain rule, but in each instance must be determined by the jury on consideration of the situation, character, and probable uses of the property affected. There was therefore no error in the refusal of the court to direct a verdict.

In rebuttal, evidence was offered and admitted, over objection, and exception, to the effect that, after and by reason of the elevation of the railroad tracks, smoke, cinders, and dust in increased quantities were blown upon the plaintiff's property. It is conceded that this evidence was not admissible primarily against the city, but, testimony having been offered in the city's behalf for the purpose of showing benefits to the property by reason of the elevation of the railroad tracks, the abolishment of grade crossings, and the establishment of subways under the railroads at Archer avenue on the north, and at 22d and other streets to the south, it is urged that it became competent to show the disadvantages resulting from the elevation of the tracks in abatement of the supposed benefits. The fallacy of this position is evident. The plaintiff sought, and was entitled to claim, damages only for the vacation and closing of the street. The railroads, owning their right of way, were privileged, doubtless, to elevate their tracks, without liability for the consequences to adjacent lands. In no event, certainly, could the city be responsible for such consequences. Within the rule stated, the city was liable to the plaintiff for the injury caused by the closing of the street, but, the vacation having been ordered in connection with the elevation of the railroad tracks and the establishment of subways near by, which could be used in going to and from the plaintiff's premises without incurring the dangers of the grade crossing, it was

Same—Same—Same.

proper that the jury, in determining the amount of damages, should consider these facts, since they had a direct and necessary bearing upon the question to be determined. The plaintiff was deprived of ingress and egress in one direction, but at the same time was furnished with better and safer ways of coming and going by circuitous routes, and the question was, what was the net injury? The original evidence of the plaintiff and that adduced by the plaintiff in error bore directly upon the point, both having relation to the means of ingress and egress; but the evidence in rebuttal, to which objection was made, has no bearing upon that point. It is true that witnesses for the city spoke of the advantages resulting from the elevation of tracks and the establishment of subways, but it is clear that the fact of elevation was a mere incident, not deemed to be in itself beneficial, except as it made subways possible. If benefit to the plaintiff had been asserted merely on account of the embankment, as, for instance, that it afforded a desirable protection to the premises of plaintiff, it might have been proper in rebuttal to show any disadvantage resulting from the same cause, but on the case as presented the evidence excepted to was incompetent. The judgment below is reversed, with direction to grant a new trial.

NOTES.

Vacation Authorized by Legislature— Right to Compensation.—Unless authorized by the legislature, a city has no power to vacate its streets. But where such vacation is authorized, a municipality may vacate streets if compensation is made to abutting lot owners who have built or purchased upon such street on the strength of a perpetual easement of passage over the street. Chicago, etc., R. Co. *v.* Quincy, 136 Ill. 563; Heinrich *v.* St. Louis, 125 Mo. 424, 46 Am. St. Rep. 495; Meyer *v.* Village of Tenopole's, 131 Ill. 552; Gray *v.* Iowa Land Co., 26 Iowa 387; Field *v.* Barling, 149 Ill. 556. See also, Knapp, Stout & Co. *v.* City of St. Louis, 4 Mun. Corp. Cas. 42, and *notes*.

Same.—Unless there is special constitutional restriction to the contrary, the legislature by virtue of its full and complete power over streets, may either vacate such streets themselves or authorize a city to discontinue the public easement in them. Heller *v.* Atchison, etc., Ry. Co., 28 Kan. 625; *In re* Stuler's Road, 28 Pa. St. 199; Band *v.* Rice, 63 Pa. St. 489; Hinchman *v.* Detroit, 9 Mich. 103; Riggs *v.* Board of Education, 27 Mich. 262; Barclay *v.* Howell's Lessee, 6 Pet. (U. S.) 498; Stubenranch *v.* Neyenesch, 54 Iowa 567; Kortland *v.* Macon, 66 Ga. 385; People *ex rel.* Mizner *v.* Hair *et al.*, 29 Hun (N. Y.) 125.

Same—No Right to Compensation.—But in Paul *v.* Carver, 24 Pa. St. 207, it was held that the legislature had the power to vacate a street without the consent of abutters or making compensation to them for injury consequent upon such vacation. In delivering the opinion the court said: "A public road belongs to nobody but the state; and when

Notes

ernment sees proper to vacate it, the consequential loss must be r those who suffer it." McGee's Appeal, 114 Pa. St. 470; Tearing , 55 N. Y. 486; Whitsett *v.* Union Depot & Ry. Co., 10 Col. 243; *v.* San Francisco Orphan Asylum, 48 Cal. 490; Bailey *v.* Phila. . Ry. Co., 4 Harring (Del.) 389; Chicago *v.* Building Asso., 102 People *v.* Walsh, 96 Ill. 232; State *v.* Huggins, 47 Ind. 586; *v.* Gansberg, 44 Ind. 418; Kimbal *v.* Kenosha, 4 Wis. 321; Barr oosa, 45 Iowa 275; Trenton R. R. Case, 6 Whart. (Pa.) 25; Tear-win, 55 N. Y. 486; Jersey City *v.* State, 30 N. J. L. 521; Coster ay, 43 N. Y. 399; Hinchman *v.* Detroit, 9 Mich. 95; People *v.* N. Y. 192; Haynes *v.* Thomas, 7 Ind. 38; State *v.* Hampton, 2 2; Haywood *v.* Charleston, 34 N. H. 23; Bauer *v.* Andrews, 7 Pa.) 359; Kellenger *v.* Railroad, 50 N. Y. 206; *In re* Trenton , 6 Whart. 25; Commissioners *v.* Gas Co., 12 Pa. St. 318.

ion of Street—Right of Lot-Owner to Recover Damages Paid.—endant proposing "to open and extend" a street, its board of works assessed the damages, costs, and expenses thereof upon perty deemed benefited, including certain land of plaintiff, and ember 2, 1881, the assessment was confirmed. On November 22, dgment was rendered in the district court against plaintiff's land was delinquent) for the amount assessed thereon, and on January , his land was sold upon the judgment for the amount of the as-nt and costs. On June 18, 1883, plaintiff paid the amount with is land was charged by the judgment and sale to the city treas-o gave him a receipt therefor. No part of the proposed street n opened, and the project of opening and extending the street n abandoned by the city. *Held*, that plaintiff is entitled to re-e amount paid by him in an action against the city alone, as failure of the consideration for which the same was paid. *Held* that even if the abandonment took place before the payment de by plaintiff, though after the judgment and sale mentioned, ll entitled to recover, the payment not being voluntary but by n of law. Valentine *v.* City of St. Paul (Minn.), 26 N. W. Rep.

ion of Streets by Court.—Under provisions of state, the court ter sessions shall submit petitions for appointment of viewers to streets, to the town council. *Held*, that this act recognizes and ient to give such court jurisdiction to vacate streets. *In re* Vaca. Union St. (Pa.), 21 Atl. Rep. 406. As to vacation by court, see . Adams (N. J.), 21 Atl. Rep. 937.

r of Town Officials.—Town officials have the power to vacate and a discontinuance adjudicated by the proper tribunal is com-thout more. Coakley *v.* Boston, etc., Ry. Co., 159 Mass. 32; Hal. Franklin Co., 2 Metc. (Mass.) 558; Tinker *v.* Russell, 14 Pick. llock *v.* San Francisco Asylum, 48 Cal. 490; East St. Louis *v.* n, 119 Ill. 200; Brady *v.* Shinkle, 40 Iowa 275; Grove *v.* Allen, 92 19; McKinney *v.* Baker, 100 Iowa 362; State *v.* Deer Lodge 19 Mont. 582; Holloway *v.* Delano, 40 N. Y. St. Rep. 762; Tes-chenbach, 29 Ill. App. 373; Kings County Ins. Co. *v.* Stevens 13 Am. & Eng. Corp. Cas. 454; Com. *v.* Western, 1 Pick. 136; Boston & A. R. Co., 150 Mass. 174; Scutt *v.* Southbury, 55 Conn.

405; Bigelow *v.* Hillman, 37 Me. 52; Ashcraft *v.* Lee, 81 N. Car. 135; Buchanan *v.* Baker, 54 Ohio St. 324; Thompson *v.* Mayor, 58 N. H. 242.

Circumstances Governing Vacation—Effect of Occurrence—Judicial Determination.—The legislature has power to determine what circumstances shall vacate a public highway, and that upon the occurrence of such circumstances, it shall be deemed vacated without any judicial determination. State *v.* Huggins, 47 Ind. 586.

Same—Injunction to Restrain.—The fact that the owner of an adjacent lot objects to the vacation of the street does not give the owner of land outside the city a sufficient cause for enjoining the proceedings of the city in the proposed vacation of the street. House *v.* Greensburg, 93 Ind. 583.

Same.—Under proper circumstances an injunction will lie to prevent a common council from enforcing an illegal order made by it for vacating a street. Speigel *v.* Gansberg, 44 Ind. 418.

SISSON

v.

TOWN OF STONINGTON.

(*Supreme Court of Errors of Connecticut, Dec. 18, 1900.*)

[47 Atl. Rep. 662.]

Change of Grade—Evidence—Admissibility.—As tending to show that defendant in an action against a town for damages for change of highway grade had not refused or neglected to apply to a judge for appointment of a committee to assess the damages (such refusal or neglect being in issue, and being necessary, under Gen. St. 1888, § 2706, before such action can be brought), defendant may, in connection with evidence that the parties orally agreed to submit the question of damages to arbitration, show that it reduced the agreement to writing, signed it, and presented it to plaintiff to sign, and that she, in violation of her agreement, and without notice to defendant, brought the action, and give the writing in evidence.

Same—Joint Contract—Instruction.—Where defendant claimed that the contract sued on was one by defendant with several persons jointly, and therefore could not be sued on by plaintiff alone, an instruction laying down general principles, but nowhere calling the attention of the jury to the facts or evidence of the case tending to show whether or not the contract was a joint one or a several one, nor pointing out how the jury could determine one way or the other, is insufficient.

Same—Draining—Damages for Overflow.—Plaintiff in an action against a town for change of grade of a highway having rested her claim for damages chiefly on the fact that the change of grade had caused the water from the highway to flow down on her land, and defendant having claimed and asked the court to instruct that, under the circumstances of the case, it was not liable for damages from the flow of

water, and that the provisions of Gen. St. 1888, § 2683, had no application to such a sluice way or culvert as had been shown to exist in the case, and being entitled to have the substance of its request given (there being no evidence that plaintiff's land was a dooryard or an inclosure used exclusively for storage and sale of goods and merchandise), the instruction given is insufficient, it being: "That, unquestionably, is the law; but, in draining, it must be done in a proper manner. They have no right to allow the water, by their own act, to so flow upon the premises as to make a reservoir or pond of a man's premises. They have a right to drain there. No doubt about that. They are not, in making those improvements, bound to keep that sluiceway unobstructed, but they are bound to use all proper diligence. They have the right, as the gentleman claims, under this law, to properly drain onto and through and upon the premises of a person."

Appeal from superior court, New London county; William T. Elmer, Judge.

Action by Abbie O. T. Sisson against the town of Stonington. Judgment for plaintiff. Defendant appeals. Reversed.

The complaint in this case is in two counts. The first one alleges that the plaintiff is the owner of a piece of land in Stonington bounded southerly by a highway; that in December, 1897, the town, by its selectmen, was making repairs and changes in the grade of said highway, whereby the highway was made temporarily impassable; that the selectmen requested permission, which the plaintiff granted, to use her said land for a highway until the repairs were completed, and that in consideration thereof the selectmen promised to pay her therefor a reasonable compensation; that such compensation was $300. The plaintiff demanded that sum. The second count alleged that the selectmen changed the grade in the said highway, thereby doing damage to her said land. The count then avers: "(5) That the said plaintiff and the selectmen of said town were unable, and have ever been unable, to agree as to the damages sustained by said plaintiff to her land by reason of said change of grade (6) That the said plaintiff on the 28th day of April, A. D. 1898, requested the selectmen of said town of Stonington, in writing and personally, to apply to any judge of the superior court to appoint a committee of three disinterested electors to estimate and assess the damages so sustained, or any benefits that might accrue to said plaintiff by reason of said alteration in said highway and change of grade thereof, in accordance with section 2706 of the General Statute Laws of Connecticut (revision of 1888). (7) That said selectmen on said 28th day of April, A. D. 1898, refused said request, and still do refuse and neglect to grant such request, and have ever refused to apply to any judge of the superior court for said purpose. (8) That the damages, etc., were one thousand dollars." The answer was in three defenses. The first was, in

Case Stated.

substance, a denial of the whole complaint. The second was this: "(1) In the month of September, 1898, while the plaintiff and the defendant were endeavoring to agree as to the damages sustained by the plaintiff, and the benefits accruing to the plaintiff, by reason of the change of grade alleged in the complaint, the plaintiff and the defendant agreed to submit the entire controversy to the arbitrament and award of Charles H. Babcock and Eben P. Couch, and a third person to be agreed upon by them, pursuant to which agreement the defendant drew and caused to be drawn a written agreement and submission, which the defendant delivered to the plaintiff's attorney. (2) While said negotiations were pending, and while the defendant was waiting for the plaintiff to execute said agreement, while the defendant was in good faith attempting to agree with and settle the questions and claims of the plaintiff for damages and benefits, and without any further notice from the plaintiff, or demand on her part, the plaintiff brought this suit, so that the defendant in this action and the selectmen of the defendant town had not failed to agree with the plaintiff as to the damages sustained by her or the benefits accruing to her, nor had said town waived its rights to apply to a judge of the superior court for such relief as is provided under section 2706 of the General Statutes (revision of 1888). The third defense was this: "(1) The benefits accruing to the plaintiff by the change of grade as alleged in the plaintiff's complaint were greater than the damages sustained by her, by reason of improving the value and usefulness of the lands of the plaintiff described in her complaint, and other lands owned wholly or in part by some of the plaintiffs, situated near said change of grade, and abutting upon said highway where said change of grade was made. (2) The other lands herein referred to are described and made the basis of other and further claims and suits by this plaintiff, Abbie O. T. Sisson, for the same change of grade as that alleged in the plaintiff's complaint in this case." The plaintiff, in reply, denied all the matters alleged in the second and third defenses. The issues so formed were tried to the jury. The plaintiff had a verdict. The defendant now appeals.

Hadlai A. Hull, for appellant.

Abel P. Tanner and Charles B. Waller, for appellee.

Andrews, C. J. (after stating the facts). Section 2706 of the General Statutes provides that "if the selectmen of any town and any person interested in the layout, opening, grading or alterations of any highway or private way therein cannot agree as to the damages sustained by or the benefits accruing to such person thereby; the selectmen shall apply to any judge of the superior court who having caused reasonable notice to be given to the parties interested shall appoint a committee of three disinterested

Change of Grade —Evidence— Admissibility.

ctors to estimate and assess to such person injured or bened the damages sustained or the benefits accruing to him by ch layout, opening or alteration of such way"; and then the ction provides for the proceeding by the committee, and on their report. This section has been commented on by is court in several cases. Nicholson v. Railroad Co., 22 nn. 74; Holley v. Town of Torrington, 63 Conn. 422, 28 l. 613; Cullen v. Railroad Co., 66 Conn. 211, 33 Atl. 910. ne general effect of these cases is to indicate that the statute rnishes the remedy for persons who are affected by the layt or alteration of any highway, and that the remedy so proded is in the first instance exclusive; that a person whose nd is thus damaged or in any way injured by the layout, teration, or change in the grade of any highway has no nding to bring any ordinary action to recover for such jury or damages until the selectmen have refused, or have glected so long as to be equivalent to a refusal, to make plication to a judge of the superior court pursuant to the atute. McCotter v. Town Council, 21 R. I. 43, 41 Atl. 572; re Marsh, 71 N. Y. 315.

The second count in the complaint is the principal one. It nforms to the law as just above stated. In it, the plaintiff, show her right to maintain the action, avers that she and the selectmen of the defendant were unable to agree as to the damages sustained by her by reason of the change of the grade in the said ghway; that she requested the selectmen to apply to a judge the superior court for the appointment of a committee purant to the said statute; and that they refused, and still do fuse, so to do. In the first defense the defendant denies ese averments; and in the second defense the defendant ers that not only they had not been unable to agree as to the id damages, but they had in fact agreed to the damages,—at is, that they and the plaintiff had agreed orally to submit ne question of damages to arbitrament and award of persons amed; that the defendant reduced this agreement to writing, uly executed it, and presented the same to the plaintiff for er to sign, but that the plaintiff, in violation of her said greement, and without notice to the defendant, brought this ction; and that so they had not been unable to agree with he plaintiff as to said damages, and they had not neglected r refused to apply to a judge of the superior court. In her eply the plaintiff denied these allegations of the defendant. By the issue so formed, the material fact—made so by the verments of the complaint as well as of the defense—was whether or not the defendant had refused and neglected to pply to a judge of the superior court, according to the provisions of the said statute, and, as preliminary to such application, whether or not there had been any such inability to agree pon the damages as showed a refusal or neglect to make such pplication. Obviously, there could be no duty to apply to

ne—Joint ntract—Injunction.

a judge if the parties had not been unable to agree upon damages. To prove its contention upon this question, defendant offered in evidence the writing which it had pared as is above set forth. The plaintiff objected to it, the court ruled it out. This was error. In connection v the other testimony, it very clearly tended to prove that defendant had not refused or neglected to apply to a judg the superior court for the appointment of a committee. first count of the complaint alleges a contract made by her and the defendant, which she says the defendant has not k and claims damages; that is to say, she seeks to recover u a liability arising ex contractu. The second count claim recover damages upon a liability imposed on the defend by law; that is, upon a liability arising ex lege. The rule law applicable to these forms of liability differ materia But these differences were not in any wise pointed out to jury by the court. It was the defendants' contention in part of the case that they had never made any such cont with the plaintiff as she set up. It appeared that the plain was the owner in severalty of a piece of land in Stoningt as is described in the complaint. It also appeared that was the owner, jointly with her two sisters, of other adjac lands. The defendants insisted that they made one joint c tract with the three sisters to pass over all their lands f temporary highway, and that they never made any several c tract with the plaintiff, as she claimed. William A. Wilc who is spoken of as the agent of the plaintiff as well as of two sisters, testified as to the agreement he made as s agent with Mr. Stillman, the selectman of the defendant to for the use of the premises as a temporary highway. Stillman, the selectman, also testified as to this agreem Other witnesses may have testified. These two are specific mentioned. The defendant asked the court to charge jury "that, if this contract was in favor of the three sis jointly, then this plaintiff cannot enforce the contract, whole or in part, without joining the sisters." Upon request the court charged the jury like this: "That i question of the testimony, gentlemen,—if they have brou an action to this court which should have been a joint act instead of a several action. The plaintiff claims they did It is a principle of law that they must join; that there joint ownership and a joint responsibility. It is a ques in which you must rely upon the evidence. The plain claims that it has been fully proved that Miss Sisson acting for herself alone, or her agent was acting for her, and then went on at some length to speak of the principl joint contract and joint obligations. But nowhere did court call the attention of the jury to the facts or the evide of the particular case which tended to show whether or the contract here in question was a joint one or a several c nor did he point out to the jury how they could detern

one way or the other, or determine which was proved or which not proved. There was in the charge no safe guidance to the jury to a correct result. "It is not the proper course for a judge to lay down general principles applicable to a case, and leave the jury to apply them, but it is his duty to inform the jury what the law is, as applicable to the facts of the case." Morris v. Platt, 32 Conn. 75.

Same—Draining—Damages for Overflow.

In the second count of her complaint the plaintiff sought to recover damages under section 2706, Gen. St. 1888. She alleged that she was the owner of lands in the town of Stonington, adjoining a certain highway in that town, the grade of which had been changed, and that such change of grade had done damage to the land. Her ownership of the land was not disputed, nor the change of the grade of the highway. The conflict was on the amount of damages. The town contended that the land of the plaintiff had not been damaged at all, but, on the contrary, had been benefited. The plaintiff, on the other hand, claimed that her land had been very greatly damaged. She laid especial stress upon the fact, which she insisted was proved, that in the changing of the grade the defendant had caused the water from the highway to flow down to and upon her land. This seems to have been the part of the plaintiff's case upon which she chiefly rested her demand for damages. The defendants claimed that under the circumstances of this case they were not liable at all in damages for the water that flowed onto the plaintiff's land. They claimed, and asked the court to so instruct the jury, that the provisions of section 2683 had no application to such a sluiceway or culvert as had been shown to exist in the case. There had been no evidence that the plaintiff's land was a dooryard, or was an inclosure used exclusively for the storage and sale of goods and merchandise. The court said to the jury: "That, unquestionably, is the law; but, in draining, it must be done in a proper manner. They have no right to allow the water, by their own act, to so flow upon the premises as to make a reservoir or pond of a man's premises. They have a right to drain there. No doubt about that. They are not, in making those improvements, bound to keep that sluiceway unobstructed, but they are bound to use all proper diligence. They have the right, as the gentleman claims, under this law, to properly drain onto and through and upon the premises of a person." It seems to us that this instruction fell far short of the duty which then rested on the court. The defendant was entitled to have the substance of its request given to the jury. This instruction did not state to the jury the correct rule of law applicable to the circumstances. The liability to which towns and selectmen may subject themselves, in the repair or in the changing of the grade of a highway, for turning water upon the land of an adjoining owner, has been recently and quite fully stated by this court in several cases,—notably in Bronson

v. Borough of Wallingford, 54 Conn. 513, 9 Atl. 393; Byrne v. Town of Farmington, 64 Conn. 367, 30 Atl. 138; and Downs v. City of Ansonia, 73 Conn. 33, 46 Atl. 243. The court wholly omitted to instruct the jury upon the law as stated in these cases.

These are various assignments of error in the appeal. But as there must be a new trial for the reasons already mentioned, and as the other questions are not likely to arise on such new trial, we deem it unnecessary to consider them. There is error. The other judges concurred.

PEOPLE

v.

BRUCE.

SAME *v.* CHAMBERS.

(*Supreme Court of Washington, Jan. 12, 1901.*)

[63 Pac. Rep. 519.]

Ordinances—Power of Council to License Bicycles.*—Ballinger's Ann. Codes & St. § 1011, subd. 4, gave the town councils of towns of the fourth class general power to control and manage their streets, and subdivision 17 authorized such councils to make all such ordinances and regulations as might seem to further the peace, good government and welfare of the towns. *Held*, that the councils had no power, under such provisions, to exact a license fee as a prerequisite to the right to ride a bicycle on the town streets; the streets being public highways, and the bicycle a vehicle reasonably adapted to travel thereon.

Appeal from supreme court, Chehalis county; Charles W. Hodgdon, Judge.

Andrew Bruce and L. H. Chambers were convicted of violating a town ordinance by riding bicycles on the town streets without having paid a license fee. From a judgment of the superior court reversing the convictions by a justice of the peace, the town appeals. Affirmed.

James H. Parker, for appellant.

Irwin & Bridges, for respondents.

Fullerton, J. The town of Hoquiam, a municipal corporation of the fourth class, passed in due form an ordinance making it unlawful for any person to ride any bicycle, tricycle, velocipede, tandem, companion, or vehicle of like character

*See notes at end of case.

within the corporate limits of the town of Hoquiam, "until the owner thereof shall have paid unto the city of Hoquiam annually the sum of one dollar, and obtained a license therefor"; further making a violation of the ordinance a misdemeanor punishable by fine. The respondents were charged in separate complaints, made before a justice of the peace, with having violated the ordinance, and upon a trial were convicted and fined. From the judgments of conviction they appealed to the superior court, where the judgments were set aside on the ground that the ordinance was invalid. The town brings the cases here.

By subdivision 4, § 1011, Ballinger's Ann. Codes & St., the town councils of towns of the fourth class are given power "to establish, lay out, alter, widen, extend, keep open, open, improve, and repair streets, * * * and generally to manage and control all such highways and places"; and by subdivision 17 of the same section power is given to the town council "to make all such ordinances, by-laws, rules, regulations and resolutions not inconsistent with the constitution and laws of the state of Washington, as may be deemed expedient to maintain the peace, good government and welfare of the town." Undoubtedly, under these general provisions, municipalities of the fourth class have power to pass all reasonable ordinances necessary to a proper regulation of the use of the streets. They can prohibit, as this ordinance does, the riding of bicycles on the streets in the manner known as "coasting," or "hands off," or in excess of a reasonable rate of speed, or on certain of the sidewalks of the town, and may prescribe and enforce penalties for the violation of such regulations. But the streets of the town are, nevertheless, public highways, common to all the citizens of the state, and may be used by them for the purposes of travel in any of the recognized methods in which the highways of the state are used. A bicycle is a vehicle, within the meaning of the law, and the rider thereof on the public highways is entitled to the same rights and privileges, and is governed by the same rules that govern persons riding or driving any other vehicle thereon. To ride a bicycle on the public highways is not of itself unlawful, nor is it so much in the nature of a nuisance as to require special police surveillance. A municipality, under its general powers to manage and control its streets and to pass ordinances for the good government and welfare of the town, is without power to exact a license fee as a prerequisite to the right to travel on its streets, if the method adopted be usual and reasonable, and not calculated to prevent a reasonable use thereof by others, and is without power, therefore, to require a license fee as prerequisite to the right to ride a bicycle thereon. Whether it may do so under an express statutory grant of power we do not now determine. The judgments are affirmed.

Dunbar, C. J., and Reavis, J., concur.

Notes

Municipal Power to License Vehicles.—A municipal government usually possesses the power, either by express grant, or by virtue of their general authority, to make by-laws and ordinances relating to the public safety and good order of the inhabitants; to regulate the rate of speed of the travel of vehicles in the public streets; the route or street over which omnibuses, stage coaches, drays, etc., may run; the time of day in which the streets may be used for certain purposes; to interdict stoppages in the streets to the delay of others; to exclude vehicles of all kinds from entering upon or passing over the sidewalks, etc. And it has been decided in many cases that bicycles and tricycles are vehicles within the meaning of that term, and are subject to municipal regulation as are other vehicles that travel upon the streets. Twilley *v.* Perkins, 77 Md. 260; State *v.* Yopp, 97 N. Car. 477; Taylor *v.* Goodwin, L. R., 4 Q. B. Div. 228.

The public safety and convenience may require regulations of this character, but they must not, unless made by virtue of specific authority, be unreasonable, or improperly in restraint of trade, or of the exercise of personal rights, or of the lawful use of private property. Com. *v.* Stodder, 2 Cush. 562, 48 Am. Dec. 679; Com. *v.* Robertson, 5 Cush. 438.

Same—Bicycles.—In State *v.* Yopp, 97 N. Car. 477, it was held that a statute forbidding any person to use a certain road for riding bicycles or other non-horse vehicles without the express permission of the road superintendent was valid and clearly within the police powers of the state. See also, Twilley *v.* Perkins, 77 Md. 260, 19 L. R. A. 632.

Same—Bicycle as Vehicle.—In the case of Mercer *v.* Corbin, 117 Ind. 450, 20 N. E. Rep. 132, it is held that a bicycle is a vehicle, and entitled to the right of the road and had no lawful right to the use of sidewalks. Taylor *v.* Goodwin, 27 Wkly. Rep. 489, L. R., 4 Q. B. Div. 228; State *v.* Collins, 16 R. I. 371, 17 Atl. Rep. 131; Holland *v.* Bartch, 120 Ind. 46; Swift *v.* Topeka, 43 Kan. 671; Schimpf *v.* Sliter, 64 Hun 463; *In re* Wright, 63 How. Pr. (N. Y.) 345.

For authorities holding that a bicycle is a vehicle, see Taylor *v.* Goodwin, 42 Q. B. Div. 228; Reg *v.* Justin, 24 Ont. Rep. 327; Swift *v.* Topeka, 43 Kan. 671; Myers *v.* Hinds (Mich.), 68 N. W. Rep. 156; Thompson *v.* Dodge, 58 Minn. 555; Geiger *v.* Perkiomen, etc., Turnpike Road, 167 Pa. St. 582; Lacy *v.* Winn, 4 Pa. Dist. Rep. 409.

Same.—In City of Cincinnati *v.* Bryson, 15 Ohio 625, it was held that the city council has the right, in exercise of its power to license vehicles, to require a reasonable amount for granting such license. See also, Cincinnati *v.* Benhansen, 22 Ohio L. J. 421; Haynes *v.* Cape May, 52 N. J. 180; St. Louis *v.* Heinrich, 6 Mo. App. 591; Washington *v.* McGeorge, 146 Pa. 248. See also, Brooklyn *v.* Breslin, 57 N. Y. 591; Commonwealth *v.* Stodder, 2 Cush. (Mass.) 562; City Council *v.* Pepper, 1 Rich. (S. Car.) Law 364; St. Louis *v.* Woodruff, 4 Mo. App. 169; Frankford Ry. Co. *v.* Philadelphia, 58 Pa. St. 119; Johnson *v.* Philadelphia, 69 Pa. St. 445; Allerton *v.* Chicago, 6 Fed. Rep. 555; Frommer *v.* Richmond, 31 Gratt. (Va.) 646; Logan *v.* Pyne, 43 Iowa 524; Gale *v.* Kalamazoo, 23 Mich. 344.

Same—License of Public Vehicles.—Where power is granted a municipality to regulate and license horse-railways, coaches, carriages, etc.,

such power does not extend to the taxation of private vehicles. St. Louis *v.* Grove, 46 Mo. 574.

In Walker *v.* New Orleans, 31 La. Ann. 828, it was held that a city has no right to require that persons owning vehicles for hire within its limits and who have paid their city licenses, shall obtain from the city, at a certain fixed and exorbitant price, the plates which an ordinance of the city has prescribed for the convenient identification of the vehicles. Such an exaction is another license in disguise, and, therefore, unconstitutional. See also, St. Louis *v.* Grove, 46 Mo. 574; Snyder *v.* Lawrence, 8 Kan. 82; Logan *v.* Pyne, 43 Iowa 524; St. Louis *v.* Woodruff, 4 Mo. App. 169; City Council *v.* Pepper, 1 Rich. (S. Car.) Law 364; Frommer *v.* Richmond, 31 Gratt. (Va.) 646; Brooklyn *v.* Breslin, 57 N. Y. 591; Brooklyn *v.* Nodine, 26 Hun (N. Y.) 512.

LINCOLN ST. RY. CO. *et al.*

v.

CITY OF LINCOLN *et al.*

(*Supreme Court of Nebraska, Jan. 4, 1901.*)

[84 N. W. Rep. 802.]

Statutory Provisions—Exemption from Assessment—Paving Tracks—Assessments for Costs.—Where, under the provisions of the constitution and the statute requiring the consent of a majority of the electors of a city before a street-railway company is authorized to construct and operate a street railway in such city, an ordinance is adopted submitting to the electors the proposition of giving their consent to the construction and operation of a proposed street railway, and in which ordinance it is provided "said railway track shall be so constructed as to present the least practical obstruction to the ordinary public use of the streets, and that it shall, when required, conform to the established grades of the streets as now or hereafter to be established when such streets are brought to grade; and further, said railway company shall be subject to all reasonable regulations in construction and use of said railway which may be imposed by ordinance,"—*held*, assuming that such provisions became a part of the charter of the corporation, having the elements of a contract with respect thereto, that an exemption from special assessment was not created, and the legislature was not thereby prohibited from imposing a liability on such corporation to pave the park of the street occupied by its tracks in conformity with the improvement of the remainder of the street, or, in the event of its neglect or refusal so to do, to authorize the levy of special assessments or taxes against the property of such railway company for the costs and expenses necessary to pave such right of way to conform to the remainder of the street improvements.

Construction of Franchise—Express Exemption.—The charter or grant of franchise rights to a corporation is to be construed strictly,

and a claim of exemption cannot be sustained which is not in express terms granted, or clearly implied from the terms of the grant.

Franchises—Power to Alter.—Under the constitution and laws of this state, special charters to corporations, with the exceptions mentioned, are prohibited. Corporations receive their franchises only by general law, and are subject to all the legal rules and statutes as to the reserve power of the lawmaking body of alteration and amendment. The laws of the state and the articles of incorporation are considered in the nature of a grant, and constitute the charter of the company.

Authority to Operate Railway—Consent of Majority of Electors.—The provisions for obtaining the consent of a majority of the electors of a city before a street-railway company is authorized to construct and operate a street railway over the streets of such city do not authorize the city to grant a charter to, or enter into a contract in respect thereto with, such street-railway company.

Derivation of Charter Rights—Grant Determined by General Law.—The charter rights are derived from the state, and the provisions of the ordinance, under which the consent of a majority of the electors is secured, obligate the street-railway company to construct its street railway within the time and in the manner stated, and make it subject to such regulations as might lawfully be established by ordinance. The corporation is thereby privileged or permitted to enter upon the streets of the city for the purpose of constructing its tracks and to carry out the purpose of its organization, and it thereby derives no other or greater right than a privilege, license, or permission to enter upon the streets for such purpose. Its grant of corporate franchises or privileges is not determined by such ordinance, but by general law.

Legislative Requirement—Paving—Cost—Lien on Property.—The right of the legislature to require street-railway companies in cities of a certain class to have the part of the streets occupied by their tracks in conformity with the improvement of the remainder of the streets, or, in the case of their failure or neglect to perform such duty, to authorize the municipal authorities to make such improvement, and, by the levy of a special assessment, charge the cost and expense thereof against such street-railway company, which shall be a lien on its property, is a reasonable exercise of the reserve power vested in the legislature, and in no wise violates or impairs the obligation of a contract with respect to the charter of such street-railway company.

Same—Police Regulation.—Whether or not the power may be exercised as a police regulation, or as a taxing power belonging to the legislature, not finally determined.

Same—Special Legislation.—Where, by the charter provisions governing cities of the first class, it is provided that street-railway companies in such cities shall be required to pave that part of the street occupied by the tracks of such companies, and in case of their failure or refusal the city is authorized to perform such work and levy the cost and expense thereof as a special assessment against the property of such companies, such act will not be deemed special or class legislation because not applying to all street railways in cities of different classes throughout the state.

Lincoln St. Ry. Co. *v.* City of Lincoln

Statutory Requirement—Construction.—By the provisions of the act of 1887 governing cities of the first class, requiring a street-railway company to pave its right of way, and, in case of its refusal and neglect so to do, authorizing the municipal authorities to perform the work and to levy and collect the cost and expense thereof as a special assessment against the property of such railway company, a tax is not imposed by the legislature upon a municipal corporation or the inhabitants or property thereof for corporate purposes; and the act is not violative of section 6 of article 9 of the constitution.

Same—Part Invalid—Personal Judgment.—The provisions of the act of the legislature of 1887 authorizing a judgment *in personam* for the amounts levied as special assessments to pay the cost and expenses of paving the right of way of a street railway in cities of the first class do not, even if invalid, render the entire act unconstitutional. The remainder of the act is complete and enforceable, independent of the provisions authorizing a personal judgment. Whether or not the act with regard to a personal judgment is invalid is not determined.

Same—Right of Redemption.—The act is not unconstitutional because no provisions are made for the redemption from sales of real estate for nonpayment of taxes or special assessments as provided for by section 3 of article 9 of the constitution. Under the constitutional provision the right of redemption is made secure to all those whose property as therein mentioned may be sold for nonpayment of taxes or special assessments, and the right is secured in the absence of statutory provisions more definitely pointing out the mode by which the redemption may be made. The constitutional provisions are held to be self-executing.

Same—Paving Districts—Assessment—Levy Valid.—Under the city charter act of 1889, governing cities of the first class, an ordinance was passed by the city council creating paving districts, and providing for the improvement of the streets therein, and the payment of the cost thereof by special assessment upon abutting property owners,—the special assessment being levied by resolution, as provided for in section 74,—after which the city council sat as a board of equalization to equalize the assessments, correct errors, etc., and thereupon made the final levy, but not by ordinance. *Held*, that such levy was valid, and that an independent ordinance making the final levy was not required. *Held*, further, the provisions of subdivision 2 of section 68, Acts 1887, relating to the levy by ordinance of special assessments and other taxes authorized by statute, do not apply to levies of special assessments or taxes for special benefits received because of local improvements.

Municipal Power—Method Prescribed by Statute Must Be Followed.—Where the method for exercising the power conferred by statute upon municipal corporations is specially prescribed, that method must be followed, in order to validate the action taken thereunder; but, where no particular method for the exercise of the power is specified, the city authorities may act by resolution or other appropriate manner, and such action will be as effectual as it would be by ordinance for the same purpose.

Jurisdiction of Council—Challenge of Authority—Authority Not Dependent on Jurisdiction.—In four certain paving districts the jurisdiction of the city council to act is challenged on the ground of the

alleged insufficiency of the respective petitions of property owners. The council acted on such petitions, finding them sufficient, and thereupon engaged in the work of paving the streets in such district. *Held* that, as to a street-railway company which is required to pave its right of way to conform to the remainder of the street improvement, it is immaterial whether or not the paving petitions had the required number of signatures. The authority to require the street-railway company to pave its right of way does not depend upon the jurisdiction of the city council to establish paving districts and engage in the work of improving the streets therein by reason of the petition asking for such improvement, but on the statutory ground that when streets are improved by the city authorities it is incumbent upon street railways occupying parts of the streets to pave in conformity therewith the portion they occupy, and upon failure or refusal so to do the council is authorized to perform the work, and, by special assessment, make the cost thereof a charge upon the property of such street-railway company.

Paving Street—Cost.—Where a city engages in the work of paving its streets, and, as a part of the general improvement, grading is done in order to accomplish the main object, *held*, that the cost of grading, being a part of a general improvement, is properly charged as being incidental to and a part of the work of paving, and that special assessments against a street-railway company for the cost of paving its right of way may properly include the cost of grading, also; the grading being incidental and necessary to accomplish the main object of paving the street.

Taxes—Interests on Levy.—Under the statute, taxes levied as special assessments in cities of the first class draw interest at the rate of 12 per cent. per annum from the time of delinquency, and a decree enforcing a tax lien arising therefrom will draw interest at the same rate after rendition.

Lien of Taxes—Perpetual.—The lien of taxes in favor of a city, levied as special assessments for street improvements, is not barred by section 11 or section 12 of the Code, but is perpetual, and may be enforced without regard to the provisions of the sections mentioned.

Lien on Property—Effect of Consolidation.—Where street improvements are made, and the cost of paving that portion of the same occupied by street-railway companies is levied as special assessments against the property of several street railways as separate properties, and the different street railways are afterwards consolidated and merged into one property and operated as one street-railway system, the old companies losing their individuality and identity, and the new company assuming the burdens and obligations of the constituent companies, *held* that, as between the consolidated company and the municipal authorities levying such special assessment, the liens arising by reason of the several assessments against the different constituent companies and properties attach to the new property owned and operated by the substituted company as one property, in its entirety, and may be enforced by the sale of the property without dismemberment and separating it into fractional properties as it existed before consolidation.

Same—Same—Mortgage—Effect.—Where, however, a mortgage was [redacted]ced upon a street-railway property, and afterwards another company,

against which certain liens for taxes levied as special assessments existed, was consolidated with the mortgagor company, *held*, that the lien of the mortgage on the property covered thereby, without the consent of the mortgagee, could not be impaired by the agreements and acts of consolidation, and that the tax lien on the property consolidated and merged into the new company and with the property mortgaged could not be made prior to the mortgage lien on all the property after consolidation; that the tax and mortgage liens attached to the specific properties embraced in the levy and the mortgage, respectively; and that the respective liens and their priority could be preserved unimpaired only by separating the different properties into their constituent parts as before consolidation, and awarding to each a lien according to priority.

Prior Mortgage Superior to Assessment—Tax Lien.—Under the provisions of section 77, c. 13a, Comp. St. 1887, which provides that "no mortgage, conveyance, pledge, transfer or incumbrance of any such property, of any such company or person, or of any of its rolling stock or personal property, created and suffered by any such company or party, after the time when any street or part thereof upon which any such street railway shall have been laid, shall have been ordered paved, repaved, macadamized or repaired, shall be made or suffered except subject to the actual or prospective lien of said special taxes, whether actually levied or not, if such levy be in contemplation," *held*, that the lien of a mortgage attaching to a street-railway property before street improvements were projected or in contemplation was prior to the lien of taxes levied thereafter as special assessments for the costs and expenses of paving the right of way of such street-railway company to form to the improvement of the remainder of the street.

Ordinance—Lien—Authority.—Under an ordinance providing for the payment of certain sums by a street railway in obtaining a permit to lay its tracks in streets already paved, and requiring that a bond be given as security for the discharge of the liability assumed, *held*, that there is no authority for making the sums due under the provisions of such ordinance a lien on the property of a street-railway company, as in the cases of taxes levied as special assessments.

Action by Municipality Brought by Proper Officers—Their Authority Presumed.—A municipal corporation is authorized to sue and be sued by its corporate name; and where an action is brought by a city, in its corporate name, by its proper law officers, it will be presumed that the action is authorized, until the contrary appears.

(Syllabus by the Court.)

Error to district court, Lancaster county; Holmes, Judge.

Action by the city of Lincoln and others against the Lincoln Street-Railway Company and another. From a judgment for plaintiffs, defendants bring error. Reversed.

Ames & Ames, Wm. R. Hornblower, and James Byrne, for plaintiffs in error.

J. R. Webster, C. O. Whedon, and E. C. Strode, for defendants in error.

Lincoln St. Ry. Co. *v.* City of Lincoln

Holcomb, J. The Lincoln Street-Railway Company and the New York Security & Trust Company, mortgagee of its property in trust, by proceedings in error to obtain a review of the trial had in the district court pray a reversal of the judgment therein rendered in favor of the city of Lincoln, plaintiff in the court below, for the sum of $108,526.58, principal and interest, and $2,915.60, penalties, for taxes or obligations in the nature of special assessments levied by the city of Lincoln on the property of the street-railway company, plaintiff in error, as well as certain assessments levied against other street-railway companies operating street-railway lines in the city, which were, after the assessments, and before proceedings for a recovery thereof were instituted, consolidated with and merged into the company against which this action is brought. A recovery is sought for the cost of paving that part of the paved streets occupied by the street railways, including in most instances the cost of grading, and is based upon many different assessments in different paving districts, and against the several companies operating various lines of railway, and covering a period of several years from and including the years 1888 to 1895. The amount found due is adjudged to be a first lien on all the lines of the defendant company situated in and near the city of Lincoln now or at any time during the existence of the tax liens mentioned in the petition owned by the defendant company, or of which it became possessed by the several agreements of consolidation; also, other lines in and near the city, constructed before or during the pendency of the action, which became the property of the defendant by purchase or otherwise, including its franchise, track, ties, roadbed, right of way, side tracks, appurtenances, buildings, real estate, etc., belonging to the defendant company, all as one property. It is further adjudged that the defendant trust company's mortgage or trust deed is subject to the lien of the plaintiff city for the amount of the tax liens so as aforesaid found to be due. The decree was adjudged to draw interest at the rate of 12 per centum per annum, and the property ordered sold if the sums found due were not paid within a short time therein stated. The correctness of the judgment is challenged by the plaintiffs in error upon several distinct and different grounds, but primarily for the reasons, as alleged, the enforcement of the claim of the city is violative of different provisions of the federal and state constitutions, in that it impairs the obligation of a contract, and the legislation authorizing the assessments contravenes different sections of the fundamental law of the state. The particular objections interposed, and which appear necessary to a rightful determination, will be considered in the further discussion of the case.

Case Stated.

The authority for making the several assessments against the defendant and constituent companies afterwards consolidated with it is founded on the provisions contained in

s 76 and 77 of chapter 11 of the Laws of 1887, entitled
:t to incorporate cities of the first class having less than
iousand inhabitants, and regulating their duties, powers,
vernment":

:. 76. All street railway companies now existing or
er created, in any city governed by this act or that shall
:er be organized thereunder, shall be required to pave
or repave between and to one foot beyond their
Pro- exempt- assessing assess- Costs. outer rails, or, in case said railway use more than
one track in any street, they shall pave between
and to one foot beyond their outer rails where
such company owns at their own cost. When-
ıy street shall be ordered paved or repaved by the mayor
:y council of such city, such paving or repaving shall
e at the same time and shall be of the same material or
ter as the paving or repaving of the street upon which
ilway track is located unless other material be specially
l by the board of public works. Such street railway
nies shall be required to keep that portion of the street
:d by them to be paved, in repair, using for said purpose
ne material as the street upon which the track is laid at
int of repair, or such other material as the board of
works may require and order upon streets in cities
ed by this act. * * * The track of all railway com-
when located upon the streets or avenues of the city,
e kept in repair and safe in all respects for the use of
veling public, and such companies shall be liable for
ıages resulting by reasons of neglect to keep such tracks
ir, or for obstructing the streets or avenues of such
* * *

:. 77. In the event of the refusal or neglect of such
ailway companies to pave, repave or repair when so
d by the mayor and council, upon the paving or repav-
any street upon which their track is laid, the mayor and
l shall have power to pave, repave or repair the same,
e cost and expense of such paving, repaving or repair-
ay be collected by levy and sale of any real or personal
ty of said street railway company, the same as special
re collected. Special taxes for the purpose of paving
ts of any such paving, repaving, macadamizing or re-
of any such street railway may be levied upon the
including the ties, iron, road-bed and right of way, side
and appurtenances, including buildings and real estate
ing to any such company or person, and used for the
e of such street railway business, all as one property,
ı such part of such tracks, appurtenances and property
be within the district paved, repaved, macadamized
ired, or any part thereof, and shall be a lien upon the
y upon which levied from the time of the lien until
d. No mortgage, conveyance, pledge, transfer or in-
ınce of any such property of any such company, * * *

created or suffered by any such company or party after the time when any street or part thereof, upon which any such street railway shall have been laid, shall have been ordered paved, repaved, macadamized or repaired, shall be made or suffered, except subject to the actual or prospective lien of such special taxes, whether actually levied or not, if such levy be in contemplation. * * * The railroad track, or any other property upon which such special tax shall be levied, or so much thereof as may be necessary, may be sold for the payment of such special taxes in the same manner and with the same effect as real estate upon which such special taxes may be levied may be sold. It shall also be competent for any such city to bring a civil action against any party owning or operating any such street railway, and liable to pay said taxes, to recover the amount thereof, or any part thereof delinquent and unpaid, in any court having jurisdiction of the amount, and obtain judgment and have execution therefor, and no property, real or personal, shall be exempt from any such execution. * * * No defense shall be allowed in any such civil action, except as goes to the ground work, equity and justice of the tax, and the burden of proof shall rest upon the party assailing the tax. In case part of such special tax shall be shown to be invalid, unjust and inequitable, judgment shall be rendered for such amount as is just and equitable, and costs shall follow the judgment. * * * The provisions of this act in regard to the levy, collection and enforcement of special taxes to pay the cost of paving, repaving, macadamizing or repairing of any such street railways shall apply to all such special taxes hereafter levied."

It is argued by the learned counsel for the defendant and the mortgagee trust company, and with much plausibility, that the enforcement of the legislative provisions just quoted, as against these defendants, is an impairment of the obligations of a contract, and is therefore obnoxious to the provision of the federal constitution in respect to such matter. This contention is built upon the theory that, in the ordinances submitting to the electors of the city the proposition of granting consent to the different companies to construct and operate street railways over the streets of the city, there were certain provisions having within them the elements of a contract, which entered into the charter or franchise rights of such companies in the use of the streets of the city, and by the terms of which the defendant company is exempt from any obligation of the nature sought to be imposed by the assessments under consideration.

By section 1 of article 11 of the constitution, under the title "Miscellaneous Corporations," it is provided:

"No corporation shall be created by special law, nor its charter extended, changed or amended, * * * but the legislature shall provide by general laws for the organization of all corporations hereafter to be created. All general laws passed pursuant to this section may be altered from time to time or repealed.

"Sec. 2. No such general law shall be passed by the legislature granting the right to construct and operate a street railroad within any city, town or incorporated village, without first requiring the consent of a majority of the electors thereof."

Pursuant to the constitutional provisions above quoted, the legislature, by suitable enactment, has provided for the incorporation of street-railway companies; and by article 7, c. 72, p. 562, Comp. St. 1887, it is provided that the consent of a majority of the electors of the city in which it is proposed to construct and operate a street railway must first be procured, and the manner of the procurement of such consent is therein prescribed; and such act provides, among other things, after the proposition has been submitted to the electors and ascertained to have been carried, that a certificate to that effect shall be required to be made out by the city clerk by direction of the council, and given to the chief officer of the corporation, who shall cause the same to be recorded in the office of the county clerk, where articles of incorporation are recorded, and in the same book (section 5); "and thereupon such street railroad company shall be authorized to proceed and construct and operate such street railroad as described in its articles of association, or any portion thereof, subject to such rules and regulations as may be established by ordinances of such city." In the ordinance adopted, submitting to the electors of the city the proposition of giving their consent to the use of the streets by the several corporations mentioned in these proceedings, as required by the statute and constitution, before such corporation would have the right to construct and operate a street railroad within the city, it was provided as follows: "Said railway track shall be so constructed as to present the least practical obstruction to the ordinary public use of the streets, and that it shall, when required, conform to the established grades of the streets as now or hereafter to be established when such streets are brought to grade; and further, said railway company shall be subject to all reasonable regulations in construction and use of said railway which may be imposed by ordinance."

Conceding for the time being, and for the present purposes only, that in the ordinance submitting the question of consent of the electors of the city to the use of the streets for a street railway the provisions quoted entered into and became a part of the charter of the corporation, and defined the terms of the grant or franchises obtained by the company, we are unable to find anything therein contained which was intended, or could by any reasonable rule of construction be said, to exempt the company from liability to pave and repair its right of way, as required by the section of the statute quoted. It is a well-recognized and generally accepted rule of construction that where exemptions are claimed under grants of franchise rights the language will be strictly construed, and a claim of exemptions.

Construction of Franchise—Express Exemption.

cannot be sustained which is not in express terms granted, or clearly implied from the terms of the grant. Delaware Railroad Tax, 18 Wall. 206, 21 L. Ed. 888; Com. v. Easton Bank, 10 Pa. St. 451; Union Pass. Ry. Co. v. City of Philadelphia, 101 U. S. 528, 25 L. Ed. 912. Says Judge Cooley, in his work on Taxation (2d Ed., p. 205): "It is a very just rule that, when an exemption is found to exist, it shall not be enlarged by construction. On the contrary, it ought to receive a strict construction, for the reasonable presumption is that the state has granted in express terms all it intended to grant at all, and that, unless the privilege is limited to the very terms of the statute, the favor would be extended beyond what was meant." And on page 207: "The most striking illustration of the rule of strict construction of exemptions is seen in the case of special assessments for local improvements, such as paving and repairing of streets, etc. It is almost universally held that an exemption from taxation will not extend to such assessments." In Western Paving & Supply Co. v. Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770, it is held that a charter having the elements of a contract, granted to a street-railway company, is to be strictly construed against the company, and that it has no doubtful rights under such charter; for, where there are doubts, they are construed against the grantee, and in favor of the city. The supreme court of Illinois says that, though a railroad company is exempt by its charter "from all taxation of every kind except as herein provided," it is liable for special taxes levied on its right of way for street paving adjacent thereto. Illinois Cent. R. Co. v. City of Decatur, 38 N. E. 626. In the language of the ordinance quoted and relied on we are unable to find any words from which it may be inferred that it was the intention to exempt the defendant company from the charges sought to be imposed in the present instance; and, unless the exemption is clearly expressed, the doubt, if any there be, must be resolved against the company. We find no words of limitation or restriction by which it may be said the legislature deprived itself of the right to impose upon the street-railway company the burden of paving and repairing, or paying the cost thereof, that part of the paved streets of cities of the class mentioned, composing its right of way and occupied by its tracks. In these several ordinances under which the consent of the electors was secured it was specially provided that the railway company should construct and maintain its tracks so as to present the least practical obstruction to the ordinary public and general use of such streets, and be subject to all reasonable regulations in the construction and operation of its railway. It is a matter of common knowledge that by charters, statutes, and ordinances of regulation, street-railway companies are usually required to pave and keep in repair their right of way over the street in conformity with the improvements made by the local authorities. The Reports are filled with decisions upon the sub-

ject, statutes are numerous imposing the obligation, and the fact that the exercise of the power is of such general application is of itself evidence that the requirement is regarded as a reasonable and just one. The railway company is given the prior and almost exclusive use of the portion of the streets occupied by its tracks, the public surrendering its right to use such portion for the benefit of the company; and that it should be required to keep the part of the street it occupies in good repair, and in uniform condition as to grade and pavement as that of the remainder of the street, seems to be founded in rudimentary principles of justice and fairness, as between the company and the public at large. Not only is there an entire absence of words from which the exemption claimed can be inferred, but, on the contrary, it would seem the requirement as to paving can only be regarded in the light of a reasonable regulation contemplated by the language of the ordinance relied on. It is quite clear that the provisions are incapable of any reasonable construction which will create the exemption claimed. None of the authorities cited appear to us as going to the extent of holding that similar provisions in ordinances admittedly granting franchise rights secure to a corporation immunity from burdens such as are sought to be imposed in the case at bar, or the enforcement of which could impair the obligation of a contract, nor are we disposed to the view that provisions such as are under consideration are restricted and refer only to the obligation of a street-railway company to not interfere or obstruct the city in the prosecution of municipal improvements upon streets occupied by such railway company, as contended for by plaintiff's counsel. A proper construction must be determined from the language used and the circumstances and purposes of its adoption, and the object to be accomplished thereby. It contained no words of restriction or limitation as to obligations of the company under its franchise. No mention is made, nor is there a basis for an inference, of exemptions from taxation or other assessments of any character. It provided only—and was declaratory of the provisions of the statute—that the corporation should be subject to rules and regulations established by ordinance of the city.

This brings us directly to the question of the nature, scope, and legal effect of the ordinance under which defendant claims exemption, which it is desired briefly to consider. Counsel for defendants insist that the ordinance established a contract with respect to its franchise, defines its terms, and grants property rights, which are infringed upon by the statutes afterwards enacted, requiring the company to pave the part of the streets occupied by its tracks. We observe no authority in the statute giving to the city the right to grant charters to street-railway companies, and, as all such authority must be derived from the statute, we must conclude that, unless it is found there, it does not exist. By the constitutional provisions quoted, special charters are pro-

Franchises—Power to Alter.

hibited, and corporations receive their franchises only by general law, and subject to all legal rules and statutes as to the reserved right of the lawmaking power of alteration and amendment. The laws of the state and the articles of incorporation are considered in the nature of a grant, and constitute the charter of the company. Abbott v. Refining Co., 4 Neb. 416; Manufacturing Co. v. Sheldon, 44 Neb. 279, 62 N. W. 480. In the case of a street-railway corporation, the grant by the legislature under general law is by the constitution ineffectual, without such company first obtain the consent of a majority of the electors to the construction and operation of a proposed street railway over the streets where such railway is to be constructed. The statute provides how such consent may be secured. Article 7, c. 72, p. 562, Comp. St. 1887. It is therein provided how the question shall be submitted. No authority is given the city, except to submit the proposition. It is not authorized to grant a charter upon any terms whatever. There is, we think, a marked distinction between a provision enacted for the purpose of securing the consent of a majority of the electors of a city for a street-railway corporation chartered under the general laws to construct and operate a street railway over the streets of such city, and authority to the city, as a municipal corporation, to grant to such corporation a charter to construct its railway over the streets under terms and stipulations entered into by such city. While it is essential that the consent of a majority of the electors be secured before any charter or franchise rights can accrue to a street-railway company, the provisions of the constitution and the statute requiring such consent cannot be made the basis of a contract respecting corporate rights and privileges between the city and such company. The charter rights are derived from the general law. The consent of a majority of the electors can only be regarded as a condition precedent, on the happening of which is dependent the right to construct and maintain on the streets a railway, and does not enlarge or restrict the grant arising by virtue of the general laws, or in other respects affect the legislature in the exercise of its lawful authority. The property rights of the defendant company, its right of an easement in the streets for the purpose of its creation, and its corporate franchise derived under the law, are all recognized and respected.

Authority to Operate Railway —Consent of Majority of Electors.

If contention of counsel be correct, and the ordinance and its acceptance constitute a contract between the city and defendant with respect to its franchise, then it is in the power of the authorities of the different towns and cities to enter into contract relations with respect to such franchise, which in effect creates special charters, nullifies the constitutional provisions referred to, and renders impotent the legislature as to all future legislation in regard to such matters. This, clearly, is not the law. If it were sought to deprive the de-

fendant of any of its "vested rights," many of the authorities cited would be applicable and carry great weight. Defendant assumes that the city has granted it a charter, and that in that charter it is exempted from any assessment, either as special benefits, or as a reasonable regulation and an exercise of the reserve power of the legislature. We think it in error in both respects. The provisions relied on do not, in our judgment, warrant the inference that the burdens sought to be imposed were exempted; nor do the corporate rights and privileges of the defendant have their origin in the ordinance under which the consent of the electors was obtained, but in the general laws of the state. The ordinance, so far as the provisions relied on are concerned, should, it seems to us, be regarded as one of regulation, authorized by statute, and not of contract, creating vested rights. Says the eminent author of Constitutional Law (Judge Cooley), in City of Detroit v. Detroit & H. P. Ry. Co., 43 Mich. 145, 5 N. W. 278: "Legislators cannot thus bind the hands of their successors where the elements of contract, concession, and consideration do not appear; and the doctrine that they may do so by contract is one so exceptional and so liable to abuse, that courts will not be astute in discovering the existence of a contract between the state and those who claim a franchise under it, where the essential elements of a contract are not manifest. All questions of doubt are to be solved in favor of the state in such cases, and 'to be in doubt is to be resolved.'" With authorities cited by counsel in support of the doctrine against impairment of contract obligations we entirely agree, but are unable to conclude therefrom that any contract right in the case at bar is in any way impaired. Where cities are authorized to, and do in fact, grant charters under conditions and agreements establishing a contract, the rule invoked would apply; but in the absence of authority to enter into such agreements, or where no agreement in fact exists, other rules must be resorted to in determining the rights of contesting parties. The distinction we are endeavoring to draw is clearly recognized in nearly all the cases cited, and especially in Coast-Line R. Co. v. Mayor, etc., of City of Savannah (C. C.) 30 Fed. 646. In that case, it appears, the city was authorized to, and did, enter into a contract with the railway company which contained mutual stipulations under which the railroad should be constructed and operated,—among others, in the event of paving by the city of the whole or any portion of the street used by the railway company, the portion of the track between the rails should be paved and kept in good repair by the company at its own expense and cost. It was there held not only that the city had authority, but that the contract was valid under the laws of the state at the time made, and that afterwards different terms could not be imposed on the corporation to its injury and for the benefit of the other contracting party. It is said in the opinion: "The reservation of the state to with-

draw the franchise of this railroad company cannot be disputed, and that reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities 'derived by its charter directly from the state.' But rights and interests acquired by the company, not constituting a part of the contract of incorporation, stand upon a different footing. It is competent for the state, in the exercise of its reserve power, to alter the act incorporating the company in all particulars, constituting the grant to it of corporate rights, privileges, and immunities. These flow from the state, and should properly be kept under its control." The holding in that case was placed distinctly on the ground of the authority of the city to enter into the contract which it did, and that such contract gave to the railway company rights in no wise connected with its franchise from the state. Also, in City of Chicago v. Sheldon, 9 Wall. 50, 19 L. Ed. 594, wherein it is said: "A contract having been entered into between the parties, valid at the time by the laws of the state, it is not competent even for the legislature to pass the act impairing its obligation. Much less could any decision of its courts have that effect. A point is made that the legislature has not conferred or intended to confer authority upon the city to make this contract. We need only say that full power was not only conferred, but that the contract itself has been since ratified by this body."

No authority being conferred upon the city to contract with a street-railway company with respect to the grant of its corporate rights and franchises, we think it follows that, by the provisions of the ordinances under which the consent of a majority of the electors was secured, the railway company obligated itself to construct a railway within the time and manner therein stated, and be subject to such regulations as might lawfully be established by ordinance in conformity with the statute in that regard, and was thereby privileged or permitted to enter upon the streets of the city for the purpose of constructing its tracks so as to carry out the purposes of its organization; that by such ordinance it derived no other or greater right than a privilege, license, or permission to enter upon the streets for such purpose; and that its corporate franchises and privileges were not determined and fixed by such ordinances, but by general laws. In Chicago City Ry. Co. v. People, 73 Ill. 541, it is held that a franchise emanates from the state, and where a company is incorporated by the legislature with power to construct and operate a railway in a city, upon the consent of the city, in such manner and upon such conditions as the city may impose, and the city by ordinance grants the privilege of constructing and operating the same, the grant by the city is a mere license, and not a franchise. In the opinion it is said: "But in the case at bar the grant in the ordinance is not a franchise, but a mere license,—a permission to construct a

Derivation of Charter Rights—Grant Determined by General Law.

railway in a certain street within a limited period. A franchise, according to the definition given by Blackstone, is a royal privilege or branch of the king's prerogative, subsisting in the hands of the subject, and, being derived from the crown, must arise from the king's grant. 2 Bl. Comm. 17. Corporate franchises in the American states emanate from the government or the sovereign power, owe their existence to a grant, or, as at common law, to prescription, which presupposes a grant, and are vested in individuals or a body politic. The grant or license given by ordinance comes within no definition of a franchise. Besides, a municipal body, it is understood, possesses no power to confer a franchise. Davis v. Mayor, etc., 14 N. Y. 506." In State v. Jacksonville St. Ry. Co. (Fla.) 10 South. 590, it is stated in the third syllabus: "It is within the power of the legislature to delegate to municipal corporations the right to license or permit railroad companies to lay railroad tracks in the streets in such manner as not to divert them from their original uses; but a difference exists between the power of a municipal corporation to grant a corporate franchise, and the right to permit a corporate franchise, and the right to permit a corporation vested with such franchise to place railroad tracks in the public streets. If the municipal body can ever grant a corporate franchise, such power must be expressly conferred by the legislature." In the opinion of the court it is said: "The legislature has undoubtedly supervision and control of highways and streets, and may authorize the construction of a railroad, operated either by steam or animal power, across or along them. This results from the dominant power which the state possesses over all its highways, and it may be done without the consent of municipal authorities. 2 Dill. Mun. Corp. 656; Elliott, Roads S. pp. 562, 563; Pierce, R. R. p. 246; Lawson, Rights, Rem. Prac. § 4003; Eichels v. Railway Co., 78 Ind. 261; Savannah & T. R. Co. v. Mayor, etc., of City of Savannah, 45 Ga. 602; Hodges v. Railway Co., 58 Md. 603." And further on in the same opinion it is said: "Here it may be proper to say that there is a material difference between the power of a municipal corporation to grant a franchise, or authority to construct a street railroad and take tolls and emoluments for service, and the right to license or permit corporations vested with such franchises to lay tracks in streets in such manner as not to divert them from their original uses. If municipal bodies can ever exercise the power to grant such corporate franchises, it must be expressly conferred by the legislature. The cases of Davis v. Mayor, etc., 14 N. Y. 506, and People's R. Co. v. Memphis R. Co., 10 Wall. 38, 19 L. Ed. 844, were decided, we understand, upon the theory that the municipal bodies had no such power."

We now reach what we conceive to be the most cogent reason for upholding the validity of the sections of the statute assailed by defendants. We are convinced that the power

therein exercised is one reserved to the legislature by the constitution, and of which it is incapable of devesting itself; and, for stronger reasons, it could not authorize a city council to act in such a manner as to deprive it of such power. The right being reserved to the legislature by the constitution, it is empowered to alter, amend, or repeal the laws respecting street railways in such manner as is approved by its wisdom and judgment; and this right extends not alone to laws providing for the incorporation and organization of such companies, but also to those which seek to control, regulate, and otherwise affect such corporations in the enjoyment of their franchises. Says Judge Field, in the United States supreme court, with reference to a reservation in a statute that the charter of every corporation should be subject to amendment, alteration, or repeal by legislative authority: "The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state." Tomlinson v. Jessup, 15 Wall. 454-459, 21 L. Ed. 204-206. Of like import is Maine Cent. R. Co. v. Maine, 96 U. S. 499, 24 L. Ed. 836, in which the opinion was written by the same eminent jurist. In speaking on the same subject, Judge Cooley, in City of Detroit v. Detroit & H. P. R. Co., supra, says: "But for the provision in the constitution of the United States which forbids impairing the obligations of contract, the power to amend and repeal corporate charters would be ample, without being expressly reserved. The reservation right leaves the state where any sovereignty would be if unrestrained by express constitutional limitations, and with the powers which it would then possess. It might, therefore, do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional provisions. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired." The right to alter or amend is not an unrestrained right, but a power which is to be exercised subject to fundamental principles controlling all valid legislation. Says Mr. Justice Swayne in Shields v. Ohio, 95 U. S. 319, 324, 24 L. Ed. 357, 359: "The power of alteration and amendment is not without limit. The alterations must be reasonable. They must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations in such cases are surrounded by the same sanctions and are as inviolable as in other cases." Or, as is said in Com. v. Essex Co., 13 Gray, 239: "When, under power in a charter, rights have been acquired and become vested, no amendment or alteration of

the charter can take away the property or rights which have become vested under legal exercise of the powers granted."

No property or vested rights are endangered or lost to the defendant by the sections of the statute objected to. The power invoked is a regulation to which all, in some form or other, are subjected in bearing the burdens incident to the growth and development of the municipality. As before intimated, the requirements are only reasonable, and appropriately attach and belong to a street-railway company in the conduct of its business over the paved streets of the city. For both the validity and reasonableness of the exercise of the legislative power objected to, we have precedent well supported by authority. In Conway v. City of Rochester (N. Y. App.) 51 N. E. 395, under a law quite similar to the one now under consideration, it was held, in a contest between the city authorities and abutting property owners whose property has been assessed for special benefits of paving a street, that the law made it mandatory upon the city council to require the street-railway company to pave its right of way, and that the burden which thus rested on the company could not be shifted to abutting property owners. In Wood v. Common Council (Sup.) 56 N. Y. Supp. 105, the views expressed in the Rochester Case were reiterated and followed. In that case it is held that the provisions of the statute requiring street-railway companies to pave between their tracks and two feet from the outside therein applies to all street surface railway companies, whether incorporated prior or subsequent to the act; that the omission of a charter of a street-railway company of a provision compelling it to pave streets along its tracks does not vest in it or its successors a perpetual exemption from such obligation subsequently imposed by the legislature under the power given it by the constitution, providing that all general laws creating corporations may be altered from time to time; and that a city council was without power to exempt street-railway companies from the provision of the general laws of the state requiring pavement by them of the streets along their tracks. Although cautioned against giving weight to this case, because the decision was rendered by a tribunal of inferior jurisdiction, we find many points in it having an intimate bearing on the case at bar, and regard its reasoning as logical and sound, and the propositions considered as a correct exposition of the law. Storrie v. Railway Co. (Tex. Sup.) 46 S. W. 796, was a case involving the rights of a mortgagee of a street-railway property; legislation affecting the corporation, mortgagor, having been enacted subsequent to the execution of the mortgage. The charter or law governing the city of Houston provided that the costs of a street improvement should be charged against abutters, and that a street railway should be liable for costs of paving between the rails and for six inches on each side. It was there held that the company was liable for pav-

Legislative Requirement—Paving—Cost—Lien on Property.

ing to the extent stated, notwithstanding a resolution by the city council providing that costs of the improvement should be wholly defrayed by the abutting property owners. The constitution of that state provided that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the legislature or created under its authority shall be subject to the control thereof." It was held that the legislature had the right to amend the city charter so that the street-car company became liable for the cost of paving six inches on each side of its tracks, in addition to its principal liability of paving between the rails, and that such law was not unconstitutional, as impairing the obligation of a contract in reference to the prior mortgage, executed while the constitutional provision was in force. Says Brown, J., after quoting the provision of the constitution: "This provision of the constitution was in force at the time the street-railway company acquired its rights in the streets of Houston, and before the mortgage of the trust company was executed. The rights of both the street-railway company and the mortgage company were acquired subject to the control of the legislature upon this question. The legislature had the right to enact the law of 1891 amending the charter of Houston, by which the liability of the street-car company for the cost of paving the street was enlarged. That act does not violate the constitution of this state nor of the United States." In Sioux City St. Ry. Co. v. Sioux City (Iowa) 43 N. W. 224, in an opinion afterwards affirmed by the supreme court of the United States (138 U. S. 98, 11 Sup. Ct. 226, 34 L. Ed. 898) it was held that, although the charter of a street-railway company required it to pave inside its rails, a subsequent ordinance passed by the city, in pursuance of an act of the legislature, requiring it to pave one foot outside of its rails, is not in violation of the obligation of a contract, assuming the charter to have been a contract, and did not thereby preclude the city from imposing additional burdens which were authorized by the laws of the state. At the time of the organization of the street-railway company there was a provision in the Code of Iowa which read as follows: "The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times be subject to legislative control, and may be at times altered, abridged or set aside by law, and every franchise obtained, used or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the assembly shall deem necessary for the public good." In support of the same general principles, we cite City of Philadelphia v. Thirteenth & Fifteenth Sts. Pass. Ry. Co. (Pa. Sup.) 33 Atl. 126, and City of Lansing v. Lansing City Electric Ry. Co. (Mich.) 66 N. W. 949. We therefore conclude the sections objected to were

enacted by the legislature in the exercise of a valid power belonging to it, that no rights or privileges possessed by the defendant company or those consolidated with it were invaded or impaired by such legislation, and that the legislature had the right to impose the liability by said sections created, notwithstanding the ordinance under which defendant claims exemption from such liability. We do not think the law, in this respect, contravenes any provision of either the federal or the state constitution.

Same—Police Regulation.

It is also argued by the city that the legislation imposing the obligation on the defendant to pave its right of way under the circumstances prescribed may properly be sustained on the ground of the taxing power, for benefits received from local improvements, and also under the police power of the state. Because of the many questions raised in the case, the consideration of which we regard as of more pressing importance in its disposition, for want of time, and in view of what has already been said, we do not deem it advisable to fully consider these questions. Many strong and substantial arguments may be advanced in support of the proposition that the power is properly exercised as a police regulation. "The regulation," says Judge Cooley, "must have reference to the comfort, safety, or welfare of society." The comfort and safety of the public are certainly largely affected by the condition of the surface of a public street over which are run street cars propelled by electricity. Convenience in locomotion and freedom from accident on such streets materially depend upon the evenness of the surface of the streets, and the minimizing, as far as practicable, of all obstructions by reason of street-railway tracks. It is especially manifest that at all street intersections a level crossing, capable of convenient, easy, and rapid transit of both vehicles and foot passengers, is of the utmost importance to the safety of the traveling public. And for the same reason, though in a lesser degree, should there be, throughout the entire distance traversed by such street railway, free access across the streets at all points to adjoining property, as well as to facilitate the passing of vehicles traveling in different directions. It would seem that on the ground of the taxing power the legislation could be sustained. Certainly it is within the province of the legislature to provide for the taxation of street railways for property specially benefited by local improvements. Appeal of North Beach & M. R. Co., 32 Cal. 500; Cicero & P. St. Ry. Co. v. City of Chicago (Ill. Sup.) 52 N. E. 866; Railroad Co. v. Peterson (Kan. Sup.) 51 Pac. 290.

The more difficult question arises by reason of the fact that the legislature has apportioned and fixed with certainty and definiteness the portion of the streets which are to be paved at the cost of the street-railway company, and charged to it as a special benefit for the improvement made by the paving

of the street. In whatever power the authority rests, if we are permitted to speculate regarding the matter, we would say some of the elements of the several powers spoken of entered into the considerations which moved the legislature to act. The act was an exercise of the power of reasonable regulation. It is entirely fitting and proper that the street-railway company should be required to pave that part of the streets occupied by its tracks. The public comfort and safety were promoted by the exercise of such power, and the material benefits accruing to a street-railway company by the paving of a street occupied by it was doubtless an inducement which in no small degree actuated the legislative mind in framing the law imposing the obligation to pave at its own cost the part of the street occupied by a street-railway company. While it is not an abutting property owner, in the strict sense of the word, it is an owner of property lying within and forming a part of the improvement actually made, and for the sake of uniformity, appearance, use, and convenience, safety and comfort of the public, and benefits received, should, in the nature of things, bear such burden. The right of the legislature to thus provide for the cost and expense of such improvement by special assessment, and to fix the amount and apportion the charge to be borne by the different parcels of property, by the giving of notice before the assessment is made, is distinctly recognized in Spencer v. Merchant, 100 N. Y. 585, 3 N. E. 682,—a case where the reasons for the conclusions reached were not nearly so strong as in the present instance, and which case was afterwards removed to the United States supreme court (Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763), and the principle enunciated by the state court received the approval of the latter tribunal. As stated, however, we do not finally decide these two questions, preferring to ground our conclusions upon the broad and fundamental doctrine of the right of the legislature to impose the burdens as a reasonable exercise of its reserve power.

It is also argued that the act is unconstitutional because it is in the nature of a special law or class legislation, applying only to a portion of the street railway of the state. We regard the law as in no way conflicting with the provisions referred to. It is quite well settled in this jurisdiction that laws which are general and uniform throughout the state, operating alike upon all persons and localities of a class, or upon those who are brought within the relations and circumstances provided for, are not objectionable for want of uniformity or as class legislation. State v. Berka, 20 Neb. 375, 30 N. W. 267; Lancaster Co. v. Trimble, 33 Neb. 121, 49 N. W. 938. "The classification of the cities of the state into classes and subclasses, and the conferring upon them of corporate powers by acts of the legislature of a general nature, yet the provisions of which are applicable to but one of such classes or subclasses, is not repugnant to any

Same—Special Legislation.

provision of the constitution." State v. Graham, 16 Neb. 74, 19 N. W. 470. "An act is general, and not special, if it operates alike on all persons or localities of a class, or who are brought within the relation or circumstances provided for; the classification so adopted by the legislature having a basis in reason, and not being purely arbitrary." Association v. Drummond, 49 Neb. 201, 68 N. W. 375. To the same effect are Hunzinger v. State, 39 Neb. 653, 58 N. W. 194; McClay v. City of Lincoln, 32 Neb. 421, 49 N. W. 282. If, as had been repeatedly held,—and correctly so, we think,—it is competent for the legislature to classify the cities of the state, and provide different laws for the government of each class, then we think it logically follows that the inhabitants and property, including that of corporations within each of the different classes, are controlled by the charter provision applicable to that class, even though differing from provisions in some other charter, and that the enactment of laws and regulations affecting alike all street railways of any one class cannot be said to be obnoxious to the constitution because of lack of uniformity.

It is also urged that the statute violates the constitution wherein it is provided that "the legislature shall not impose taxes upon municipal corporations or the inhabitants or the property thereof for corporate purposes." This section has received consideration from this court in State v. Wheeler, 33 Neb. 563, 50 N. W. 770, and German-American Fire Ins. Co. v. City of Minden, 51 Neb. 874, 71 N. W. 995. Speaking with reference to the first case, it is said in the latter: "It is quite evident that it [the act considered in the first case] was held bad because it was an attempt by the legislature not to empower municipal corporations to impose a tax for corporate purposes, but to impose by the legislature itself a tax for corporate purposes on the inhabitants and property of the municipal corporation; this being forbidden by section 7, art. 9, of the constitution." If, then, the legislation now objected to is, in effect, the imposition of a tax by the legislature itself on the property of the defendant, and not an authority to the city to do it, the act would be void. We are constrained to the view that the act does not itself attempt to impose any tax on the defendant company. It is primarily a regulation requiring it in certain instances to pave its right of way to conform to the street improvement as directed by the city authorities, and, upon failure and refusal so to do, provides that the city is authorized and empowered to assess its property for the costs and expenses of making such improvement. It purports only to authorize the city to levy the proper assessments after paving has been determined upon, and the refusal of the street-railway company to discharge the obligation resting upon it to pave at its own expense its right of way in conformity wtih the improvement made by the city on the remainder of the street. Although the question is not directly raised, the validity of legislation of the character under consideration is recognized

Statutory Requirement—Construction.

in Horbach v. City of Omaha, 54 Neb. 83, 74 N. W. 434, where, under the police power, it is held that the legislature may authorize the city to require owners of lots upon which stagnant water may accumulate to fill and grade the same, and upon refusal the city is authorized to perform such work, and levy a special tax sufficient to pay the cost and expense, as other special taxes are levied and collected. The two cases, for the purposes of the question under consideration, are similar in principle, and differ only, if at all, in the nature of the power exercised. The legislature has not undertaken to, nor can it itself, impose a tax for municipal purposes for street paving required to be done by a street railway; nor is the city authorized to do so until after the improvement has been determined upon and projected, nor until the street-railway company shall have neglected and refused to comply with the legislative requirement. This is not imposing a tax by the legislature upon municipal corporations, or the inhabitants or property thereof, for corporate purposes.

The constitutionality of the act of the legislature under consideration is by the defendant company also questioned, because—First, the act provides for a judgment in personam; and, second, that no provisions are made for redemption after sale of property on which the lien rests, in conformity with section 3, art. 9, of the constitution, in respect of the right of redemption from sales of real estate for taxes and special assessments.

Same—Part Invalid—Personal Judgment.

The first question, we think, is prematurely presented, and is not necessarily involved in a proper disposition of the case upon the record as presented to us. At most, the act in this respect would be invalid in so far only as it affects the city's right to a personal judgment against the defendant. The right given or attempted to be given to a personal judgment only provides an additional remedy by which satisfaction may be obtained for obligations created by the levy of special assessment, and, if invalid, would leave the remainder of the act complete in itself, and capable of enforcement to the extent of the sale of the property to which the lien attached, if valid in other respects. Conceding all that is contended for by the defendants in respect of the invalidity of the act authorizing a personal judgment for the amount due for special assessments for paving, the act providing for a lien for such sums, and the enforcement of the same by a sale of the property, is not thereby and for that reason void and of no effect. In the case at bar all that is sought to be accomplished is the enforcement of the lien under the statute on the property specifically mentioned therein. When a personal judgment is sought, if one should be, the defendant can more properly interpose the defense now presented. For the purposes of this case, and the enforcement of the lien, the act, we are satisfied, is constitutional. The objections, therefore, cannot be upheld.

As to the second proposition, section 3 of article 9 of the constitution is as follows: "The right of redemption from all

sales of real estate, for the nonpayment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate for a period of not less than two years from such sales thereof: provided, that occupants shall in all cases be served with personal notice before the time of redemption expires." Under the above provision, the right of redemption is made secure to all those whose property, as therein mentioned, may be sold for nonpayment of taxes or special assessment; and this guaranty is made secure to the parties entitled thereto, in the absence of statutory provisions more definitely pointing out the method by which the redemption may be made. This view of the constitutional provision quoted must have been entertained and borne in mind by this court when in its prior utterances it has declared that the right to foreclose a lien for taxes for general revenue exists in favor of the tax purchaser without any notice of redemption under his tax certificate in accordance with the constitutional provision quoted (Van Etten v. Medlund, 53 Neb. 569, 74 N. W. 33), and where it is declared, as it has been, that a county may enforce its lien for taxes for general revenue purposes after delinquency, when the right to a sale of the property has accrued, by an ordinary equitable action in foreclosure, as was done in the case of Grant v. Bartholomew, 57 Neb. 673, 78 N. W. 314. We apprehend no insurmountable difficulty will be encountered in holding the section of the constitution quoted as self-executing, and giving to all parties who come within the provisions of that section the right to redeem real estate sold for taxes as provided therein. No difficulty would be experienced in redeeming from sale of real estate in foreclosure proceedings of a lien for taxes, after sale and before confirmation, by paying the judgment, interest, costs, and accruing costs; and we see no reason why a further extension of time after sale in which redemption might be had would in any way prevent consummation of the object contemplated by the section, and at any time within the period therein mentioned, nor do the constitutional provisions appear inadequate to fully conserve the rights of parties in regard thereto. The proceedings are in a court of equity, and it has control over all the steps therein until the rights of all parties have been fully adjudicated and finally determined under the provisions of both the constitution and the statute. The objections raised as to the question just considered are untenable.

Same—Right of Redemption.

The method of procedure adopted by the city council in levying the special assessments against the defendant, as well as the constituent companies consolidated with it, is made the basis for the contention that the levy as made is void, and for that reason imposes no liability against the property against which the taxes are sought to be enforced in this action. It is urged that because these levies were made by resolution of the city council, and not by ordinance, they cannot be sustained. It

Same—Paving Districts—Assessment—Levy Valid.

appears from the record that the different paving districts were created by ordinance providing for the improvement of the streets included therein, and the payment of the costs and expenses thereof by special assessments, to be levied upon the property benefited in such districts. Among other things, section 68 of the city charter act provides that the city shall have the power, by ordinance—First, to levy taxes for general revenue purposes; and, second, to levy any other tax or special assessment authorized by law. These two subdivisions are followed by others to the number of 63, some of which, it is quite obvious, were not to be complied with or action taken thereunder "by ordinance," as indicated by the first part of the section quoted, which, if given a literal construction, applies to all of the subdivisions alike. By subdivision 63 it is provided, in substance, that the city council shall have power to open, grade, pave, and otherwise improve the streets within the city in such manner as they may deem proper; and shall have power to levy and collect special taxes and assessments on abutting property to pay the costs and expenses of such improvements; that they shall have power to pave, and for that purpose to create suitable paving districts; and that the cost of paving, when done upon the petition of abutting property owners, shall be assessed upon the lots specially benefited, and the total cost shall be levied at one time. By section 74 of the Acts of 1889 it is provided with reference to special assessments for taxes for local improvements that such assessments shall be made by the city council at any meeting by resolution stating the cost of construction or repairs or improvements, and the benefits accruing to the property in the district to be taxed; that the vote thereon shall be by yeas and nays, and recorded in a book kept for that purpose, with notice of the time and the purpose for which the meeting is held. And it is further provided that after such assessment the council shall sit as a board of equalization, as provided for by section 50. Under section 50 the council is given power to act as a board of equalization to equalize the assessments, correct errors, etc., and shall have the same power as the board of county commissioners have similar cases; that in all cases, for special taxes shall be finally levied, it shall be the duty of the council to sit as a board of equalization for the purpose of equalizing such proposed levy of special taxes or assessments, correcting any errors, etc., and shall continue in such session for not less than two days, and shall hear complaints, and that it shall be its duty to equalize any such assessments by correcting errors therein, and thereupon said assessment and special tax shall be finally levied. Regarding the method for exercising the power conferred by statute upon municipal corporations, we understand the rule to be, in this state, that, where a special mode of action is prescribed, that method must be followed, in order to validate the action taken thereunder; but, where no particular method for the exercise of the power is specified, city

Municipal Power—Method Prescribed by Statute Must Be Followed.

authorities may act by resolution or other appropriate manner, and such action will be as effectual as it would be by ordinance for the same purpose. Fulton v. City of Lincoln, 9 Neb. 58, 2 N. W. 724; McGavock v. City of Omaha, 40 Neb. 64, 58 N. W. 543; City of Omaha v. Birkhauser, 37 Neb. 521, 56 N. W. 303. With respect to the authority given by subdivision 63 of section 68 to pave streets and levy assessments therefor, we regard that subdivision, as respects the subject of levy of special taxes, as independent of subdivision 2. By the provision of subdivision 2 for the levy of taxes, it is evidently meant such special assessments and taxes, the levying or imposition of which is to be performed by an independent act or ordinance, complete in itself, and of such taxes as are more permanent and continuing in their nature than those of special assessments for local improvements. It is at once obvious, by an inspection of the different subdivisions of section 68, that they cannot refer back to the preamble contained in the beginning of section 68, authorizing the city, by ordinance, to do certain acts, followed by 63 subdivisions. Many of these subdivisions, while classed as such, "in fact are sections,—as much so as other sections of the chapter." State v. Babcock, 23 Neb. 640, 39 N. W. 783. Classing many of these subdivisions as sections, as we think they should be, we find complete, ample, and independent authority for the levying of the tax, and in the manner adopted by the council. The authorization given by section 74 to levy special assessments in the first instance by resolution, which is to become the permanent levy, except as it may be modified by equalizing assessments and correcting errors, negatives the idea that the legislative intendment was to thereafter require another ordinance to complete the levy. It also appears to us, from a consideration of all sections related to the subject, that the legislature intended that after the levy had been made by resolution, as recited by section 74, and the council should sit as a board of equalization for the purposes mentioned, it should "thereupon," and without the delay incidental to the passage of a formal ordinance, make the final levy, substantially after the manner of county commissioners, who levy taxes for general revenue purposes after performing their duties as a board of equalization. Again, it is provided by ordinance that a paving district should be created, in which ordinance provisions are made for the improvement of the streets by levying special assessments on property benefited thereby, the enactment of which may, we think, be followed by the successive steps necessary to carry the provisions of such ordinance to a final conclusion by resolution or other proper action; and yet all such action is embraced in the original ordinance, and may be said to be under, by, or pursuant to the same, within the meaning of the statute.

In four of the paving districts, viz. Nos. 6, 7, 10, and 11 the validity of the levy of the special assessments is challenged on account of the alleged insufficiency of the petitions of

property owners praying for the creation of such districts and the improvements of the streets therein lying; it being urged that the action of the council in respect to such levies is void for want of jurisdiction. Most all of the facts upon which the judgment of the trial court is based were stipulated by the parties. With respect to the question now under consideration, it appears that the necessary number and front footage of petitioners as property owners joined in a request for the creation and improvement of the several paving districts; but, as to the four above mentioned, the necessary number of owners of front footage did not individually sign the respective petitions, but were represented thereon by others, whose authority for representing those for whom they signed did not appear of record. Whether or not such authority was in fact given by the owners at the time, or whether the signatures were afterwards sanctioned and ratified, does not appear. It is reasonable to suppose that the city council investigated the sufficiency of the different petitions, and found them to have been duly executed and legally presented. On their face, all these petitions were sufficient. The record on which the city council acted, as it appears, affirmatively shows the required petition necessary to give the council jurisdiction to act in the matter. No protest or objection to the sufficiency thereof was presented. The case is not one where there is an entire absence of any petition, or where the petition on its face shows a want of the required number of signers to give the council authority to act; nor is it a case where the alleged insufficiency of the petitions was presented to the council, and an appeal taken from adverse action thereon. Even if some of the signatures were unauthorized, it is highly probable that the same were thereafter sanctioned and ratified by the owners, so as to preclude them from questioning the authority of the city council to act; and, if such be the case, we are at a loss to understand upon what principle of the law the defendant in a collateral proceeding at this late date can complain. The attack in this respect made on the action of the city council is in a collateral proceeding; and if, after the lapse of a decade, when all have acquiesced and acted upon the assumption that the council had authority and jurisdiction to act, and much valuable property has borne the burden of the tax levied, and has been sold and transferred in faith of the legality of such proceedings, it may now be shown that owners of property were represented on the petition without authority, and thus render void all the proceedings had thereunder, the rule as to jurisdiction acquired by inferior tribunals has been carried to an extent the disastrous consequences of which can scarcely be comprehended. There exists, we apprehend, a clear and definite distinction between the rule, recognized in this court, that in the levy of special assessments the record must affirmatively show compliance with all the conditions essential to

Jurisdiction of Council—Challenge of Authority—Authority Not Dependent on Jurisdiction.

a valid exercise of the taxing power, and the circumstances of the present case, where in another proceeding irregularity is sought to be established and made the basis for declaring the action taken without jurisdiction and therefore void. The rule laid down in Ellis v. Karl, 7 Neb. 381, would seem applicable to the proposition under consideration. It is there held that a petition for relocation of a county seat, when determined by the board to be sufficient, cannot afterwards, and in a collateral proceeding, be attacked on the ground that a large number of the names attached to the petition were fictitious, forged, or names of nonresidents, leaving of the genuine signatures an insufficient number to authorize the calling of an election. Neither the genuineness nor the sufficiency of the petition being questioned before the board, it was held that a suit could not be maintained to restrain the removal of the county seat because of the defects of the petition. However, as we view the case, so far as the defendant is concerned, it is immaterial whether or not the paving petitions had the required number of signatures. Upon the improvement of the street by the city council, it became the duty of the street-railway company to pave its right of way in conformity with such improvement under the provisions of the statute, entirely aside from and independent of the question of the petition praying for the establishment of paving districts and the improvement of the streets therein. The authority to require the street-railway company to pave its right of way does not depend upon the jurisdiction of the city council to establish paving districts and engage in the work of improving the same by reason of a petition asking for such improvement, but on the statutory ground that, when streets are improved by the city authorities, it is incumbent upon street railways occupying a part of the streets so improved to pave in conformity therewith the portion they occupy, and upon failure or refusal so to do the council is authorized to perform the work, and, by special assessment, make the cost thereof a charge on the property of such railway companies. The city council has authority to pave and otherwise improve a street, independent of the provisions providing for the creation of paving districts, and levying special assessments for the cost of local improvements on abutting property owners specially benefited thereby. City of Omaha v. Birkhauser, 37 Neb. 521, 56 N. W. 303. The power to levy the tax upon the street-railway company for the cost of paving between its tracks is independent of the power to create districts and improve the streets therein upon petition and at the cost of the property owners abutting thereon. The difference in the source of authority is fully recognized in the following cases: Conway v. City of Rochester (N. Y. App.) 51 N. E. 395; Storrie v. Railway Co. (Tex. Sup.) 46 S. W. 796; State v. Jacksonville St. R. Co. (Fla.) 10 South. 590.

In the assessments levied against the defendant's property are certain items of charge for costs of grading streets, which

Paving Street —Cost.

are included as a part of the costs for the general improvements made at the time of the paving of such streets. It is argued that inasmuch as the statute recognizes grading as a distinct improvement, for which special assessments may be levied, the charge thereof cannot be charged as expenses of paving, under the authority given by the statute to collect the costs and expenses for paving the right of way when a street-railway company fails and neglects to perform its obligation in that respect. It is true, we think, that grading, as a distinct and independent improvement, may be engaged in by the authorities of a city, and the cost thereof levied against property benefited, in the manner provided for by law; and, in a case where the improvement consists only of bringing the streets to an established grade, some doubt would probably arise as to authority to require a street-railway company to pay the cost of such grading, as to its right of way, under the provisions of the statute authorizing the levy of costs and expenses of paving, as in the case at bar. In this case, however, as we understand the record, the scheme or plan contemplated and had for its main object the paving of the streets, and the grading necessary to accomplish that purpose would, under such circumstances, be regarded as incidental to the main purpose, and a proper charge as and for the cost and expense of paving that part of the street required to be improved by a street-railway company, and, as such, may be properly levied as a special tax and as assessment for paving under the provisions of the statute under which the city acted. We understand the general rule to be that where there is a requirement to pay the cost of paving, as mentioned in the statute, by such requirement there is included and contemplated all incidental work necessary and required to accomplish the main object, and that the cost of grading, when done as a part of the general paving improvement, is properly assessed as a part of the cost of such paving, in contemplation of the statute. In this view we are supported by a number of decisions which seem to us to be founded in reason and sound in law. Schenley v. Com., 36 Pa. St. 39; Dean v. Borschsenius, 30 Wis. 236–244; Williams v. Mayor, etc., 2 Mich. 560; Steckert v. City of East Saginaw, 22 Mich. 104; State v. City of Elizabeth, 30 N. J. Law, 365. With respect to the items of charges under consideration, it also appears that the defendant company appeared before the city council, acting as a board of equalization, in pursuance to notices issued for that purpose, and entered objections and protests against the assessment of these items as proper charges for the improvements for which the assessments were made, which objections were overruled by the city council, and from which ruling no appeal was taken. The city council was exercising authority conferred upon it in adjudicating such matters, and the defendant, we think, is estopped in this action from contesting the justness of these charges. Had it been dissatisfied, it should, in

a direct proceeding, have sought a review and modification of the action of the city council in including such items as proper charges to be levied and collected as special assessments, and, having neglected so to do, the question must be considered as having been finally adjudicated in these proceedings. Webster v. City of Lincoln, 56 Neb. 502, 76 N. W. 1076.

Complaint is made because interest was computed on the different levies for special assessments at the rate of 12 per centum per annum, and the judgment rendered decreed to draw interest at the same rate. We think this action was in strict accord with the provisions of the statute, and in conformity with the well-settled rule of this and other jurisdictions with respect to the rate of interest allowed on delinquent taxes levied for either general revenue purposes or as special assessments. In Osgood v. Grant, 44 Neb. 350, 26 N. W. 894, it is held that, as to general revenues, where delinquent taxes draw interest at the rate of 10 per centum per annum, such rate was proper, and that the statutory rate continued after the judgment was rendered. We see no difference in principle in the case at bar and the one referred to. By the different provisions of the statute heretofore alluded to, it is specially provided that the cost and expense of paving a street-railway right of way, where the company neglects or fails in its obligation, shall be levied as a special assessment, and collected as other taxes and special assessments. In cities of the class that plaintiff belongs to, the statutory provision in that all delinquent taxes, both general and special, shall draw interest at the rate of 12 per centum per annum from the time they become delinquent. The reason for the legislature fixing a higher rate of interest on delinquent taxes than is ordinarily the rule is discussed to some extent in Kittle v. Shervin, 11 Neb. 65, 73, 7 N. W. 861, by Judge Cobb, writing the opinion of the court; and it is, perhaps, unnecessary for us to attempt to elaborate thereon. The statute unmistakably provides for the rate, and the action of the court in this regard is in strict conformity therewith. Statutory enactments of the character under consideration are very general, as will be seen by reference to the following authorities on the subject: Ex parte Lynch, 16 S. C. 35; Craig v. Flanagin, 21 Ark. 319; Mulligan v. Hintrager, 18 Iowa, 172; Nance v. Hopkins, 10 Lea, 508; Potts v. Cooley, 56 Wis. 45, 13 N. W. 682; Tobin v. Hartshorn, 69 Iowa, 649, 29 N. W. 764.

Taxes—Interest on Levy.

It is also claimed that many of the different assessments sought to be recovered in this action are barred by the statute of limitations, and we are cited to section 11 of the Code, providing that an action shall be brought within four years on a contract not in writing, and upon a liability created by statute, other than a penalty or a forfeiture, and section 12, limiting the time as to a recovery for the two latter causes to one year. We understand the lien in cases of this kind to be perpetual in its character,

Lien of Taxes—Perpetual.

and the provision as to limitation of actions in general cannot be invoked when it is sought to enforce such lien. It is specially provided by section 50 that the lien created by the levy of special assessments and taxes shall be perpetual. We hardly think the legislature would do so foolish an act as to continue the lien indefinitely, while at the same time an action for its enforcement was barred under the general statute of limitations. The subject has received a construction in Wygant v. Dahl, 26 Neb. 572, 42 N. W. 735, wherein it is said: "Whatever may be the remedy for the collection of delinquent taxes, * * * the lien thereon has been constantly preserved, constantly reiterated by the legislature on every proper occasion, and this right and lien is recognized as unaffected by lapse of time, if it is within the sense of language to accomplish it. A clear distinction is recognized between a lien enforcing a private right and one enforcing a public right. This case being of the latter class, the statutes cannot be invoked as a ground for barring the action for the enforcement of the lien created by the provisions of the statute."

The foregoing covers, in the main, the essential points presented in regard to the validity of the sections of the statute assailed, and the legality of the several acts of the city authorities taken in pursuance of legislative authority. We now approach, for consideration, the case in another aspect, namely, the nature and extent of the several liens arising by virtue of the statute and the action of the city council, and the property against which the lien attaches, as well as the question of priority of liens as between the plaintiff city and the defendant mortgagee. In the fourth conclusion of law it is held by the trial court, in substance, that the consolidation of the several companies imposed upon the consolidated company all duties, obligations, and liabilities of the constituent companies, as well as giving it the rights and privileges of such companies; that under the articles of consolidation the defendant company assumed all legal liabilities, and hence would be liable for all taxes and assessments legally levied against each of the constituent companies, and the liens arising thereby upon merger by consolidation attached to the new property in its entirety or as one property. The conclusion reached by the trial court in this respect is excepted to, and it is asserted with much positiveness that the liens created by the several levies attached only to the property and lines of the company against which assessed, and the fact of after consolidation cannot have the effect of extending such liens to all the property brought together by the act of consolidation. In other words, it is contended that the liens created by the several levies against different properties are not affected by the after acts of consolidation, and can only be enforced as against the property to which they attached at the time, and by virtue of the levy as then made.

Lien on Property—Effect of Consolidation.

Same—Same—Mortgage—Effect.

These questions have caused us not a little labor and investigation, in an effort to apply sound legal principles and reach a correct conclusion. We are disposed to the view that ordinarily a lien on specific property afterwards merged with other property by companies consolidating will not extend to such other property on which it was not a lien at the time of the consolidation. This, of course, is subject to the rule of betterments and accessions. That such a lien cannot be diminished or impaired is a rudimentary principle of justice, acknowledged by all, and which principle in this state has been incorporated into the statutes. The lien in question may be regarded as one for taxes. It is so denominated in the statute, and is treated as other taxes levied for general purposes or as special assessments. It is made to cover all the property of a street-railway company against which assessed as one property. The object of the statute in preserving liens on property consolidated, unimpaired, is obviously for the benefit of those entitled to such liens. The consolidated company by operation of law assumes all the burdens of the constituent companies, and correspondingly succeeds to all benefits, rights, and privileges. In the several acts of consolidation of the different street-railway companies, by express terms, the new company assumed all the contracts and indebtedness of the constituent companies. While the several sums due for taxes levied by special assessments did not arise under contract, nor are they items of indebtedness, in the technical sense of the term, yet it seems apparent that the consolidated company by its own acts burdened itself with all obligations of the companies merged into it by the act of consolidation. It certainly did so by operation of law. It was charged with notice of these several assessments, and doubtless had actual notice as well. By the several acts and agreements of consolidation, the object to be accomplished was to bring the several companies into one new company. The old companies lost their identity and individuality, and became merged into the new company. The property was by such acts brought together as one complete whole, and has since been operated as such. The constituent companies and their several properties have been swallowed up by the new one. The tax lien, says the law, shall exist against the property as one property. The different parts before consolidation as a whole have been joined, so that at the time of the suit but one property existed against which the action could be directed. It would be difficult, indeed, if not impossible, to divide the new property into fractional parts, so as to correctly represent the constituent companies. While in a measure it is probably true that it can be divided up again, and, if required, should be, as far as possible, if any rights are to suffer by not doing so, yet can the consolidated company be heard to complain and demand, as a legal or equitable right, that the division shall take place, the liens separated, and the property sold in fractional parts, and by

piecemeal? Tax liens existed against the property of each of the constituent companies when consolidated with another company. The defendant company acquired the property of the Electric Company, against which certain of the liens existed; and it would seem that as to such acquired property the lien against the defendant would, by that act, extend over the acquired property, as though it had been purchased, or added to the original property by extension of its own tracks. And for the same reason the lien of the Electric Company would, in bringing the two properties together and making of them but one property, extend over the lines of the new company, "as one property." The liens being for taxes, and against the property as a whole, and by consolidation the new company being substituted, as it were, for the company merged into, it it would follow, as a logical deduction, that the substituted company's property is likewise charged with the lien on all its property in its entirety, and as one entity or one piece of property. Not only does this result follow because of the nature of the lien attaching to all the property against which assessed, and the company substituted therefor, but also on the ground of public policy, which requires, except as against those having conflicting liens, whose rights are prejudiced, that such property shall be kept intact and operated as a whole for the benefit of the people in the discharge of a duty which such corporation owes to the public.

The rule is, we think, and ought to be, that the sale of parts and parcel of a line of street railway ought not to be required and enforced, except where, to preserve vested rights and maintain unimpaired liens thereon, it becomes imperative to do so. In Elliott on Railways it is said at section 790: "While it is probably true, there may be a lien on the right of way for a local assessment, the manner of enforcing it is not clearly settled. The right of way is a part of the company's property, without which it could not perform its duties to the public. To subject a portion to sale would greatly embarrass, if not destroy, ability to perform its public functions. The rights of the public are regarded superior to those of individuals or any group. Local assessments are usually levied on a small portion of a railway's right of way. To permit such part to be sold would prevent operation of the road, and on grounds of public policy it is held the ordinary remedy of enforcing collection by sale of property benefited does not apply to an assessment against the right of way. While there is a conflict of authority, the decided weight is that the right of way, if sold to pay the assessment, must be sold as a whole, and not broken fragments. The public have a right to have a railway remain an entirety, and it would be destructive to public interest to permit it to be broken up into disjointed and practically useless fragments. Farmers' Loan & Trust Co. v. Canada & St. L. Ry. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740; Railroad Co. v. Colwell, 39 Pa. St. 337, 80 Am. Dec.

526. The principle that railroad property is assessed as a unit requires the conclusion that the lien for taxes attaches to the entire property." The views above expressed are supported by the authorities cited therein; also, the case of Georgia v. Atlantic & G. R. Co., 3 Woods, 437, Fed. Cas. No. 5,351, and Thompson v. Abbott, 61 Mo. 176.

By different acts of consolidation all of the street-railway companies against which special assessments were levied, except the Rapid-Transit Company, were consolidated with and merged into the defendant railway company at the time of the execution of the mortgage under which the defendant trust company claims. By these several acts of consolidation, and the merging of the old into the new, the liens before existing upon the property of the constituent companies extended to the new company's property, as one property. This being true, it is at once apparent that the mortgagor could give no greater rights to the mortgagee than it then possessed, and therefore the mortgage was made and accepted subject to the lien then existing for the said several assessments against the property in its entirety. It also appears by the record that in the trust-company mortgage, which covered at the time of its execution all the property of all save the Rapid-Transit Company, were provisions for the payment of liens against the property mortgaged for special assessments to pay cost of paving, for which it was stipulated that bonds to be sold in an amount necessary for that purpose should be a first lien on that property. The mortgagee has by these provisions recognized the existence of the liens attaching to the property at the time of the execution of the mortgage, and cannot now be heard to object to the enforcement of the same. At the time of the execution of the mortgage the Rapid-Transit Company, against which certain liens existed for special assessments, was an independent company, which was afterwards consolidated with the defendant company; and the question therefore arises as to the relative rights of the city and the mortgagee with reference to their respective liens against the property. The liens are conflicting, and must be adjusted according to some recognized principle of law. Can the lien of the city for special assessments levied on the property of the Rapid-Transit Company extend to all the property of the new company after consolidation, prior to and in disregard of the lien theretofore created on the property of the original company by virtue of the said mortgage? By section 8, art. 7, c. 72, Comp. St. 1899, it is specially provided with respect to street-railway corporations being merged into a new corporation by consolidation "that all rights of creditors and all liens upon the property of either of said corporations shall be and hereby are preserved unimpaired, and the respective corporations shall continue to exist so far as may be necessary to enforce the same." At the time of the consolidation the trust company possessed a lien on the property of the defendant company to the extent of the sum due on the bonds

sold and secured by the mortgage held by it as trustee. The city held a lien against the same property for special assessments levied, and also a similar lien on the property of the Rapid-Transit Company consolidated with it. The liens were conflicting, and to retain each unimpaired necessitated a finding of the several sums due against the respective properties and the priority of each. We do not understand upon what principle of law the lien existing against the property of the Rapid-Transit Company can be made a prior lien upon the property mortgaged to the defendant trust company. This, it seems to us, would be an impairment of the lien to that extent, in violation of the statutory provisions quoted, as well as the fundamental principle against the impairment of the obligation of a contract without the consent of the parties thereto. We do not think it a sufficient answer to say that the value of the property acquired by consolidation from the Rapid-Transit Company exceeded the tax lien with which it was burdened, and which therefore might be spread over the entire property without prejudice to the interest of the mortgagee. Of the value of each of the properties we are not fully informed by the record. We are, however, satisfied that the defendant trust company may rightfully insist that the property on which it holds a lien shall not be charged, beyond the terms of its contract, with a lien not existing when its rights thereto attached. As between conflicting equities and lienholders, the rule is settled and well grounded in principles of equity that the liens follow the property into the consolidated company, and one cannot take precedence, by reason of such consolidation, over other liens already existing. The lien of the defendant trust company on all of the property of the street-railway company before consolidation cannot be subordinated to the lien of the levy for special assessments on other property afterwards acquired by consolidation, and in this respect we think error was committed.

It is also urged that the trial court erred in awarding the city a prior lien for certain special assessments levied after the mortgage lien was created. The statute on the subject is as follows: "No mortgage, conveyance, pledge, transfer or encumbrance of any such property of any such company or person, or of any of its rolling stock or personal property, created or suffered by any such company or party after the time when any such street or part thereof upon which any such street railway shall have been laid, shall have been ordered paved, repaved, macadamized or repaired, shall be made or suffered except subject to the actual or prospective lien of said special taxes, whether actually levied or not, if such levy be in contemplation." The lien of the property assessed is only by virtue of the statute. The legislature has, for reasons no doubt appearing to it as sufficient and satisfactory, enacted that the tax lien should be prior if the improvement is in contemplation, whether the

Prior Mortgage Superior to Assessment—Tax Lien.

taxes are actually levied or not. By the language used it is contemplated that if the improvement has been projected and is under way; that is, if the street "shall have been ordered paved," no lien shall be created, except subject to the prospective lien. The language of the statute excludes the idea that under all circumstances the lien for special assessment shall be superior to all the other liens. If force and effect be given to the language of the statute, and the words used be taken in their ordinary and natural meaning, the conclusion is irresistible that an incumbrance placed on the property before street improvements are projected is prior to a lien for special assessments levied thereafter for such improvement. It is not for us to engage in judicial legislation, or trench on the clearly-expressed meaning of the language used by the legislature in its enactment of law. The legislature having determined under what circumstances special assessments levied on property of street-railway companies for street improvements should be a first lien on the property assessed, it follows, under any recognized rule of construction, that valid liens on the property before any improvements are made or contemplated, within the meaning of the section, cannot be subordinated to the statutory lien. We observe no escape from this conclusion. Counsel for the city insists that the general provisions as to assessments levied generally being liens on the property assessed, prior to all others, should likewise govern in the case at bar. We cannot so construe the law without ignoring entirely the language quoted, and this we are not at liberty to do. Were it not for such language, and relying only on the general provisions with reference to special assessments, we could readily agree with counsel in this regard. The principle of subordination of liens for taxes to liens created by contract has been also recognized by the legislature, in the act providing that a general lien for taxes shall exist in favor of the state on all the personal property of the tax debtor from and after the time the assessment books are placed in the hands of the county treasurer or tax collector for collection; and yet it is held that a mortgage in good faith executed on such property prior thereto is a superior lien to that of the lien for taxes. Reynolds v. Fisher, 43 Neb. 173, 61 N. W. 695; Trust Co. v. Memminger, 48 Neb. 17, 66 N. W. 1014; Banking House v. Woolsey (Neb.) 83 N. W. 730.

Certain sums were charged against the defendant company as and for special assessments for the purpose of securing certain obligations assumed by the company under an ordinance providing for the laying of its tracks in streets which had already been paved. The ordinance provides substantially as follows: That, when a street-railway company desires to construct its tracks upon any of the paved streets of the city, it shall file with the council a written application for a permit, in which should be stated where the proposed track is to be laid, and also con-

Ordinance—Lien—Authority.

taining an agreement to abide by and conform to all requirements of the ordinance. That upon the filing of such application the council shall cause an estimate to be made of the cost of the paving between the rails of such proposed track. And the company is required to pay for such privilege as follows: If the proposed tracks are constructed within one year after the cost of such paving has been levied and assessed, then the company is to pay the whole of the original estimated cost of paving between the rails of its tracks. If constructed after one year and within two years, then it should pay nine-tenths of such cost; and, for each year after, a reduction of one-tenth of the original cost shall be made. The company is also required to remove and relay paving displaced in such track construction at its own expense. The amount to be paid, it is provided, may be made by paying the whole sum due within 50 days from the date of the levy or date of the permit for such proposed construction, or in equal annual installments of one-tenth of the original cost; deferred payments to bear interest the same as special assessments upon real estate for paving; payments to be made to the city treasurer, and by him apportioned between the intersection and district paving funds, according to the amounts of such taxes in intersections and districts, and the sums apportioned to the district funds to be divided among the several parcels of real estate assessed with the cost of such paving, in accordance with the ratio of such assessments, as a credit upon the assessments thereon. That such company shall also execute and deliver a good and sufficient bond to the city for double the amount charged, with good and sufficient sureties, conditioned that the company would pay the sums of money due as provided, and comply with all the provisions of the ordinance. That, upon the filing of the bond and compliance with the preceding requirements of the ordinance, the council may grant a permit to such company to construct its tracks as desired, and the company thereupon be authorized to proceed with the work. It will be observed that there is nothing in the ordinance which authorizes the levying of a tax, or the making of the sums due under the permit granted a lien upon any of the property of such company. The company was required to give a bond for the faithful performance of the obligations it assumed in securing the permit, and it is quite evident that reliance was placed upon such security, and not upon a lien which, if it might be created, in fact never was. It is not to be doubted that the liability was a civil one existing against the company, to be enforced as all other civil liabilities, with the additional security given by the bond required to be executed in connection with the privilege obtained to lay the tracks in the streets already paved. There is no authority, however, for levying as a special assessment, the amounts due under the terms of the ordinance; nor do we understand that such was in fact done. The sum due, it appears, was simply

entered upon the records of the city by the clerk, as though it had been levied as a special assessment. No authority existed for making the several sums due under the ordinance a lien on the property of the defendant, as would be in the case of levies of special assessments under the statute for paving a right of way in confomity with a street improvement. Without authority, no lien can exist. Says Judge Cooley, in his work on Taxation (2d Ed., p. 448), "Municipal corporations, it need hardly be said, have no authority to create liens, by ordinance or otherwise, when none has been expressly conferred upon them." This rule is supported by City of Philadelphia v. Greble, 38 Pa. St. 339; Eschbach v. Pitts, 6 Md. 71; 2 Desty, Tax'n, 734. It is quite clear, and, as we understand, conceded by counsel for the city, that no legal grounds exist for holding the sums due under the terms of the ordinance a lien upon the property of the defendant company.

There is no force in the argument that the action is brought without the authority of the city. The city is by statute authorized to sue and be sued in its corporate name. The action is brought by it by its proper law officers, and the authority therefor, until the contrary is shown, will be presumed. It is not required in the first instance to plead or prove that the city authorized the bringing of the action.

Action by Municipality Brought by Proper Officers—Their Authority Presumed.

A mistake in computation of interest of some $6,000 is admitted, and a remittitur has been filed; but, as the cause must be reversed for reasons hereinbefore given, this matter can be corrected in a subsequent proceeding. The judgment must be reversed, and the cause remanded for further proceedings according to law and in conformity with the views expressed herein. Reversed and remanded.

Capital City Light & Fuel Co.

v.

City of Tallahassee.

(*Supreme Court of Florida, Oct. 10, 1900.*)

[28 S. E. Rep. 810]

Municipal Corporations—Lighting Streets—Power to Grant Exclusive Privileges to Light Companies.*—Powers granted cities and towns "to provide for the lighting of the streets of the city or town," and "to regulate, improve, alter, extend and open streets, lanes and avenues, and to cause encroachments and obstructions, decayed buildings and ruins to be removed," do not authorize a city to grant an exclusive privilege

*See notes at end of case.

to use the streets, lanes, and alleys thereof for the purpose of laying gas pipes therein, or erecting poles, wires, and towers thereon, for supplying gas or electricity to the city or its inhabitants by corporations authorized to manufacture gas or electricity.

Same—Same—Same—Statute.—That provision of the general laws for the creation of corporations in force prior to 1892, found in section 30, p. 234, McClel. Dig., did not confer any power upon cities and towns, or aid or supplement the powers conferred by the general laws appertaining to the creation and powers of cities and towns, or, in connection with other powers conferred on cities and towns, authorize them to grant exclusive privileges for the use of their streets for laying gas pipes, and erecting poles, wires, and towers therein, by gas or electric light companies organized under the general laws for the creation of corporations.

Grant of Exclusive Privileges—Construction.—A grant of exclusive privileges, the possession of which will enable the grantee to obtain a practical monopoly for a limited time of a business affecting the public interest and convenience, must be strictly construed against the grantee, and nothing passes thereby but such as is clearly intended.

Same—Corporate Powers—Vested Rights.—The exclusive privileges granted by statute (section 30, p. 234, McClel. Dig.) to corporations organized under the general laws for the creation of corporations, in force prior to 1892, did not attach to a corporation so organized until it was put into successful operation, and where, by its articles of association, it was organized to engage in more than one kind of business, the fact that it erected a plant, and engaged in one kind of business authorized by its charter, did not vest it with exclusive privileges as to other kinds of business in which it never engaged, though authorized by its charter, so as to preclude the legislature from authorizing another municipal or private corporation to engage in such business.

Same—Corporations — Monopolies—Vested Rights—Impairment of Contract Obligations.—Where a corporation is by its charter authorized to engage in a business affecting the public interest, and given exclusive privileges which tend to establish a monopoly, such grant of exclusive privileges does not become a contract or vested right, so as to be protected from impairment by the state or federal constitution, until the grantee has, to say the least, begun preparations or made some expenditures to perform the service to the public which constitutes the consideration for the grant of the privilege.

Same—Lighting Streets—Ordinance as Contract—Impairment of Contract Obligations.—Even if a city has power to grant the exclusive use of its streets for erecting poles, wires, and towers for furnishing electric lights in the city, and in pursuance of this power grants such privilege by ordinance, with a provision therein that the grantee shall not be required to furnish such lights until such time as it can make an annual profit of 8 per cent. on its investment, such ordinance does not become a contract, the obligation of which is protected from impairment by the contract clause of the state and federal constitution, so long as the grantee fails to begin preparations for or make expenditures towards erecting a plant for furnishing electric lights.

Same—Same—Impairment of Contract Obligations.—Where a corporation, authorized to construct, maintain, and operate a gas plant and

Capital City Light & Fuel Co. *v.* City of Tallahassee

an electric light plant to supply gas and electric lights in a certain city, whose charter declares that, when organized and put into successful operation, the company shall have exclusive privileges for the purpose of its creation for the term of 20 years from the date it commenced to carry out in good faith the terms of its articles of incorporation, proceeds to erect its gas plant and to supply gas in the city, but for more than 10 years after its incorporation it and its successors and assigns in interest fail to erect an electric light plant as authorized by its charter, or to begin preparations for so doing, the legislature may authorize the city to construct and operate an electric light plant for supplying the city and its inhabitants with electric lights, and legislation for that purpose does not impair the obligation of a contract with the corporation, or its successors and assigns, in violation of the state and federal constitutions.

(Syllabus by the Court.)

Appeal by complainant from circuit court, Leon county; John W. Malone, Judge.

Bill by the Capital City Light & Fuel Company against the city of Tallahassee. Demurrer to the bill sustained, and bill dismissed, and complainant appeals. Affirmed.

Fred. T. Myers, for appellant.

Geo. P. Raney, for appellee.

Per Curiam. As will be observed from the statement of the pleadings, the city of Tallahassee is asserting no right to put in and operate a plant for manufacturing gas to supply light and heat for the use of the city or its inhabitants. It proposes to erect a plant to furnish lights for municipal use, and for the use of its inhabitants, by means of electricity only. A careful reading of the ordinance passed in 1888 will show that the city is under no obligation whatever to the appellant or its predecessor company to light the streets and public buildings of the city with either gas or electricity manufactured by said companies. Nothing is said in the ordinance about lighting the streets or public buildings with electricity manufactured by the company. In respect to gas, the city was not required to use any at all, but it obligated itself to take all gas that it might wish to use in lighting its streets and buildings from the company at prices not to exceed the amounts named for a certain term of years. There is no contract, therefore, between the city and the company that the latter shall have the right to furnish the city for lighting its streets and public buildings all or any electricity used for that purpose, nor is here any stipulation in the ordinance that the city will use nothing but gas, nor that the city will not own or operate an electric light plant for supplying the city and its inhabitants with light. If the city is debarred from erecting an electric light plant by the ordinance passed by it, it is because that ordinance legally grants the company the exclusive privilege and license to use

the streets, alleys, and lots of the city for the purpose of constructing and operating a plant and its instrumentalities for furnishing electric lights in the city. Our first duty is therefore to determine whether the ordinance legally grants this exclusive privilege and license.

At the time of the passage of the ordinance all the powers possessed by the city of Tallahassee in reference to lighting the city, and authorizing the erection of structures in and over the streets, were contained in the general incorporation law for cities and towns. A general power was given "to provide for the lighting of the streets of the city or town" (section 21, p. 249, McClel. Dig.); and also "to regulate, improve, alter, extend and open streets, lanes and avenues, and to cause encroachments and obstructions, decayed buildings and ruins to be removed" (section 17, p. 248, Id.). These powers gave the city no authority to grant any exclusive privilege to use the streets of the city for the purpose of laying pipes or erecting poles and towers for furnishing gas or electric lights. Florida Cent. & P. R. Co. v. Ocala St. & S. R. Co., 39 Fla. 306, 22 South. 692; Grand Rapids Electric Light & Power Co. v. Grand Rapids Edison Electric Light & Fuel-Gas Co. (C. C.) 33 Fed. 659, and authorities there cited. So far as any exclusive privilege for the use of the streets claimed under the ordinance by the appellant or its alleged predecessor is concerned, it is sufficient to say that no such exclusive right could be granted by the city because of the want of power to grant it. That portion of the ordinance attempting to grant such exclusive use, either as to gas or electricity, is therefore void.

Municipal Corporations—Lighting Streets—Power to Grant Exclusive Privileges to Light Companies.

The appellant does not, however, rely exclusively upon the provisions of the statutes quoted for authority in the city to grant the exclusive feature of the ordinance in question. It contends that the ordinance may be sustained under a power conferred by the general incorporating act under which its alleged predecessor company was chartered, to the effect that "any corporation organized and put into successful operation under this chapter shall have exclusive privileges for the purposes of its creation for the term of twenty years from the date the corporation commenced to carry out in good faith the terms of its articles of incorporation: provided, however, that this investment shall not so operate as to divest any future legislature of those powers of government which are inherent and essential attributes of sovereignty, to-wit: the power to create revenue for public purposes, to provide for the common defense, to provide safe and convenient ways for the public necessity and convenience and to take private property for the public use, and the like." Section 30, p. 234, McClel. Dig. We do not think this section adds anything to the powers of the city. It has no reference whatever to municipal bodies. It does not purport to confer any power on them, or to aid or supplement the powers conferred by the general law appertaining to the creation of

Same—Same—Same—Statute.

municipal bodies. It purports to grant certain privileges directly by the legislature, but it does not pretend to authorize municipal bodies to grant any, and it is clear from its language that there was no design in enacting it to confer power on municipalities to grant exclusive privileges. Whatever rights and privileges of an exclusive nature the Tallahassee Gas & Electric Light Company possessed must, therefore, be derived from the general incorporation act under which it was incorporated; and this brings us to the further contention that that company, by the provisions of the statute last quoted, had an exclusive right to use the streets of the city so far as the business of manufacturing and distributing gas and electricity for the use of the city and its inhabitants is concerned, and that the appellant company has succeeded to all of its rights and privileges. And here it may be well to remark that the statute referred to was repealed before the appellant corporation was chartered under the general law, so that, if it possesses any exclusive privileges of the nature claimed, they are not derived from its own charter or any ordinance of the city enacted after its incorporation, but are derived solely from its alleged purchase of its predecessor's property, corporate franchises, and privileges.

The appellee contends that exclusive privileges of the character claimed in this case are not embraced within the class of exclusive privileges which the statute quoted, properly interpreted, meant to grant; and, further, that, if they are, such privileges are personal to the original corporation to whom granted, and cannot be transferred to another by mortgage or by judicial sale. It claims, also, that the public nature of the business in which the company was authorized to engage brings the charter within the proviso of the section which reserves power in the legislature to take away the exclusive feature of the privileges granted under circumstances therein mentioned, and that, therefore, the legislature had power to repeal the statute, as it did by the adoption of the Revised Statutes of 1892, or, at least, to modify the exclusive character of the privilege granted so as to authorize the city, for the public interest and convenience, to establish and operate an electric light plant within the city, as it did by the acts of 1897 and 1899. These are questions which we do not find it necessary to decide in the present case, being content to rest our decision upon other grounds, which we deem conclusive.

Same—Same—Impairment of Contract Obligations.

It appears from the pleadings that neither the Tallahassee Gas & Electric Light Company, nor the appellant company, ever established an electric light plant in the city of Tallahassee in pursuance of the authority conferred upon either of them. From the organization of the first company up to the time the gas plant was sold at judicial sale about six years had elapsed, and from the time of the judicial sale to the time the

city began proceedings to enable it to establish an electric light plant about six years more elapsed. During all this period of time neither company attempted to construct an electric light plant as authorized by its charter. In the meantime that provision in the general incorporation law relating to exclusive privileges had been repealed by the legislature of 1891, and an act passed in 1897 specially authorizing cities and towns to establish gas and electric light plants to supply themselves and their citizens with light, and still later, in 1899, special legislative authority was given the city of Tallahassee to establish an electric light plant. Neither the Tallahassee Gas & Electric Light Company nor appellant company has acquired any vested right to erect an electric light plant by the investment of any money in any such plant, and the questoin arises as to whether or not any constitutional right has been impaired by the repeal of the statute granting the alleged exclusive privilege, and by the legislation authorizing the city to do that which is a public benefit, and that which for some 12 years the companies have neglected to do as authorized by their charters and the city ordinance. We are unable to see that any vested right of either company, so far as the establishment of an electric light plant is concerned, is impaired by the legislation which authorizes the city to do that which it now proposes to do. In the first place, the statute, properly construed, does not grant the exclusive privilege in respect to the electric light plant as claimed. A grant of exclusive privileges to appellant's predecessor would be the grant of a franchise from the state, the possession of which would enable it to obtain a practical monopoly of the gas the electric light business in Tallahassee for the term specified. All such grants are strictly construed against the grantee, and nothing passes thereby but such as is clearly intended. Saginaw Gaslight Co. v. City of Saginaw (C. C.) 28 Fed. 529; Florida, A. & G. C. R. Co. v. Pensacola & G. R. Co., 10 Fla. 145. Under the express language of this statute, the exclusive privilege did not attach until the corporation was not only organized, but put into successful operation, and the privileges were to attach for 20 years from the time the corporation commenced to carry out in good faith the terms of its articles of incorporation. The condition upon which attached the exclusive privilege, so far as the electric light plant was concerned, has never been performed; for the company has never been put into successful operation so far as that branch of its business is concerned, nor has it ever commenced to carry out in good faith the terms of its articles of incorporation in regard to erecting an electric light plant. The first company never acquired the right to the exclusive privilege mentioned in the statute, because it failed to perform the condition precedent, and [redacted]re it had no exclusive privilege to transfer to appellant

Grant of Exclusive Privileges —Construction.

Same—Corporate Powers—Vested Rights.

company, so far as the electric light plant is concerned. In the next place, even if an exclusive privilege of this nature, tending to establish a monopoly, was granted without such express condition precedent as we find in our statute, such grant does not become a contract or a vested right, so as to be protected by the constitution of the state or the United States, until the company has, to say the least, begun to do the thing required by the charter as the consideration for the grant of such privilege. Pearsall v. Railway Co., 161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 838; Louisville & N. R. Co., v. Kentucky, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849. See, also, Chincleclamouche Lumber & Boom Co. v. Com., 100 Pa. St. 438. It would be going too far to hold that the clauses of those constitutions protecting the obligations of contracts from impairment would enable one legislature to tie the hands of another in matters of public convenience and interest, such as lighting cities, by granting charters containing exclusive privileges to perform these public benefits which are held for speculative or other purposes, without attempting to execute the powers granted. Gonzales v. Sullivan, 16 Fla. 791, text 820; Elliott, Roads & S. p. 569 et seq.

Same—Corporations—Monopolies—Vested Rights—Impairment of Contract Obligations.

Our attention is called to that clause in the seventh section of the city ordinance which required the company to put in electric lights only when sufficient consumers could be secured to pay 8 per cent. interest per annum on the additional capital required to purchase the machinery and put in successful operation electric lights. It would appear from this clause that from the beginning the company only intended to avail itself immediately of that provision of its charter authorizing it to erect a gas plant, and to use the other power granted by its charter, together with the city ordinance, to shut out competition in its business from electric light companies, intending only to put in an electric light plant whenever that plant could be made to secure it an annual profit on its investment in that plant of 8 per cent. It is quite apparent that the legislature never intended to secure to it any such right, but, on the contrary, intended the privilege to extend only so far as to secure the company from competition in matters wherein it had complied with its charter by being put into successful operation. We have seen that the city had no authority to grant exclusive privileges to use its streets for the purpose of furnishing light from gas and electricity, but, even if it did have such power, it could not confer such exclusive right, and at the same time defer construction of the plant until such time as it could be made to pay 8 per cent. upon the investment. The effect of such a provision in an ordinance like the one we are considering is that the city will not permit any other person or corporation to use its streets for the pub-

Same—Lighting Streets—Ordinance as Contract—Impairment of Contract Obligations.

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lic purpose of furnishing electric lights for 25 years, but at the same time will not require the person or corporation to whom the exclusive privilege is granted to furnish such lights until such time as it can make an annual profit of 8 per cent. on its investment. The city has no such power over its streets, which are held by it in trust for the public benefit (Florida Cent. & P. R. Co. v. Ocala St. & S. R. Co., 39 Fla. 306, 22 South. 692; Gonzales v. Sullivan, 16 Fla. 791, text 820); and, even if it did, so long as the grantee failed to invest money in a plant the ordinance could be repealed or modified, being without consideration.

We have not overlooked the fact that the first company performed its charter powers in part by erecting and operating a gas plant, and as to that plant, and the business connected therewith, it may have possessed exclusive privileges under the statute which could not be impaired by subsequent legislation, and it may be that such privileges passed to appellant through the judicial sale. As to that we express no opinion. But while the purpose of erecting both plants would be the same, in that they would both furnish light to the city and its people, yet they furnish a different light, and require separate and different plants and instrumentalities for their operation. We think they are so distinct in character as to amount to separate undertakings, and they are so treated in the articles of association of both companies and in the ordinance. Power to operate the one would not include power to operate the other, and permission to use the streets for one would not include permission to use them for the other. City of Newport v. Newport Light Co., 89 Ky. 454, 12 S. W. 1040. The exclusive privileges as to the electric light plant could not have operated as a consideration for erecting the gas plant; for such privileges, under the statute, were to attach to the electric light business only when that plant was put in.

The decree of the court below is affirmed.

NOTES.

Exclusive Privilege—Power of City to Grant.—In Grand Rapids Electric Light and Power Company *v.* Light and Gas Co., 33 Fed. Rep. 670, 20 Am. & Eng. Corp. Cas. 270, the court said: "To confer exclusive rights and privileges, either in the streets of a city or in the public highways, necessarily involves the assertion and exercise of exclusive powers and control over the same. Nothing short of the whole sovereign power of the state can confer exclusive rights and privileges in public streets, dedicated or acquired for public use, and which are held in trust for the public at large. If the charter powers of the city have invested it or its common council with the whole sovereign power and exclusive control over the streets within its limits, it might lawfully

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confer the exclusive use of its streets to the company. If, however, the city or its common council possessed no such exclusive power and control, then the grant which it attempted to make to complainant was "*ultra vires*," and therefore void, so far as it purports to confer exclusive privileges in or over the streets of the city." State *v.* Milwaukee Gas Light Co., 25 Conn. 19; Citizens' Water Co. *v.* Bridge Hydraulic Co., 55 Conn. 1; Horst *v.* Moser, 48 Ala. 129; Indianapolis *v.* Indianapolis Gas Co., 66 Ind. 396; Citizens' Gas & M. Co. *v.* Elwood, 114 Ind. 332; Sprague *v.* Birdsall, 2 Cow. (N. Y.) 419; Cayuga Bridge Co. *v.* Magee, 2 Paige (N. Y.) 116; New York St. Bank *v.* Fletcher, 5 Wend. (N. Y.) 85; Mohawk Bridge Co. *v.* N. & S. Ry. Co., 6 Paige (N. Y.) 554; Crowder *v.* Sullivan, 128 Ind. 486; Rushville *v.* Rushville Nat. Gas Co., 132 Ind. 575; Meadville Fuel Gas Co. *v.* Meadville Nat. Gas Co. (Pa.), 3 Cent. Ref. 921.

As to power to grant such privilege by implication, see People *v.* Benson, 30 Barb. 24; State *v.* Cincinnati Gaslight Co., 18 Ohio St. 262; Stein *v.* Beinville Water Supply Co., 34 Fed. Rep. 145; Saginaw Gas Co. *v.* Saginaw, 28 Fed. Rep. 529; Davenport *v.* Kleinschmidt, 6 Mont. 502; Brenham *v.* Brenham Water Co., 67 Tex. 542; Syracuse Water Co. *v.* Syracuse, 26 N. Y. St. Rep. 364.

Illustrations—Gas Company.—A municipality cannot, in the absence of express legislative authority, grant to any corporation the exclusive privilege of using the streets for laying gas mains and pipes. Indianapolis *v.* Indianapolis G. L. & C. Co., 66 Ind. 400; Norwich G. L. Co. *v.* Norwich C. G. Co., 25 Conn. 19; State *v.* Cincinnati G. L. & C. Co., 18 Ohio St. 293; State *v.* Columbus G. L. & C. Co., 34 Ohio St. 572; Memphis *v.* Memphis W. Co., 5 Heisk. 525; State *v.* Milwaukee G. L. Co., 29 Wis. 454; Garrison *v.* Chicago, 7 Biss. (C. C.) 436; Illinois & St. L. R. & C. Co. *v.* St. Louis & P. E. Co., 2 Dill. 34; Brenham *v.* Brenham Water Works Co., 4 S. W. Rep. 145; Richmond County G. L. Co. *v.* Middletown, 59 N. Y. 231; Davenport *v.* Kleinschmidt, 13 Pac. Rep. 249, 16 Am. & Eng. Corp. Cas. 301; Meadville F. G. Co. *v.* Meadville N. G. Co., 3 Cent. Rep. 921.

Same—Second Grant of Different Method of Illumination.—The grant by a city to a gas company of the exclusive privilege of lighting the city with gas does not deprive the city of the power to contract with an electric light company for lighting the city with electric lights. Parkersburg Gas Co. *v.* City of Parkersburg *et al.*, 30 W. Va. 435, 4 S. E. Rep. 650; Parrott *v.* City of Lawrence, 2 Dill. 332; Bridge Prop's *v.* Hoboken, 1 Wall. 116; Emerson *v.* Com., 108 Pa. St. 111; Saginaw Gas Light Co. *v.* City of Saginaw, 28 Fed. Rep. 529.

Railway.—A city cannot grant to one street-car company the exclusive privilege, for a term of years, of operating cars on streets so as to take away its power to grant similar privileges to other companies, unless it be specially authorized to do so by the legislature. Jackson County Horse R. Co. *v.* Interstate R. T. R. Co., 24 Fed. Rep. 306; Atchison St. R. Co. *v.* Missouri Pac. R. Co., 31 Kan. 660, 3 Pac. Rep. 284; Davis *v.* Mayor, etc., of N. Y., 14 N. Y. 506.

Under a city charter not authorizing the council to grant franchises that are exclusive, the council cannot grant an exclusive right of way

Notes

upon streets in the city. Henderson *v.* Ogden City R. Co., 46 Am. & Eng. R. Cas. 95, 7 Utah 199, 26 Pac. Rep. 286; Ogden City R. Co. *v.* Ogden City, 7 Utah 207.

Same.—A municipal corporation cannot grant to a street railway the exclusive use of its streets unless it has legislative sanction to do so. People's Pass. R. Co. *v.* Memphis (Tenn.), 16 S. W. Rep. 973.

And the power must be expressed in plain words, or so direct as to amount to the same thing by implication. Parkhurst *v.* Capital City R. Co., 56 Am. & Eng. R. Cas. 455, 23 Ore. 471, 32 Pac. Rep. 304; Saginaw Gas Light Co. *v.* Saginaw, 28 Fed. Rep. 536; Grand Rapids E. L. & P. Co. *v.* Grand Rapids, E. E. L. & F. G. Co., 20 Am. & Eng. Corp. Cas. 270, 33 Fed. Rep. 659.

Same—Subsequent Grant to Another Using Different Motive Power.—The exclusive right to construct and operate a horse railway in a city is not infringed by constructing in the same city a road to be operated by steam. Denver & S. R. Co. *v.* Denver City R. Co., 2 Colo. 673, 20 Am. Ry. Rep. 339; Teachout *v.* Des Moines Broad-Gauge St. R. Co., 36 Am. & Eng. R. Cas. 108, 75 Iowa 722, 38 N. W. Rep. 145.

Ferry Franchises.—A city has no power, under a grant to establish and regulate ferries within their limits to confer exclusive ferry franchises upon a company. East Hartford *v.* Bridge Co., 10 How. 511; Minturn *v.* Larne, 23 How. 435; Harrison *v.* State, 9 Mo. 530; McEwen *v.* Taylor, 4 G. Gr. (Iowa) 532; Wright *v.* Nagle, 161 U. S. 796; Cayuga Bridge Co. *v.* Magee, 2 Paige (N. Y.) 116; New York State Bank *v.* Fletcher, 5 Wend. (N. Y.) 85; *In re* Union Ferry Co., 98 N. Y. 139.

Same—Power to Impair Obligation of Contract.—A grant to a corporation of the exclusive use of streets for the purpose of supplying a city with gas is held to be a contract between the corporation and grantor, if such corporation has exercised its franchise in performing public services. As a valid contract, it is protected by the United States constitution but while the legislature of a state cannot impair the obligation of such contract still it does not part with its police power over the subject as public morals, health, and safety may be affected by the exercise of the franchise. New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650; Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S. 683; Rushville *v.* Rushville Nat. Gas Co., 132 Ind. 575; Indianapolis *v.* Consumers' Gas Co., 140 Ind. 107; People *v.* Deehan, 153 N. Y. 528.

As to the effect of the amendment to the Federal constitution on the power of the legislature to grant exclusive privileges and monopolies, see Slaughter House Cases, 16 Wall. (U. S.) 36.

Same—Right of the Corporation to Test Validity of Such Grant to Another.—One corporation may contest the validity of an ordinance which gives an exclusive grant to another company to supply the city with gas, water, etc. Grant *v.* City of Davenport, 36 Iowa 396; Grand Rapids, etc., Co. *v.* Grand Rapids, etc., Co., 33 Fed. Rep. 659; New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650; People's Gas Co. *v.* Jersey City, 46 N. J. L. 297.

VERGIN
v.
CITY OF SAGINAW.

(*Supreme Court of Michigan, Jan. 29, 1901.*)

[84 N. W. Rep. 1075.]

Defective Sidewalk—Knowledge of Defect—Contributory Negligence.* —That a person stepping into a hole in a sidewalk, which was filled with snow and ice, knew of the defect, does not show her guilty of contributory negligence as matter of law, where she did not have the defect in mind at the time.

Action by Married Woman—Medical Services—Evidence.—In an action by a married woman for injuries, testimony as to the value of medical services is competent, the evidence tending to show that the credit was extended to her solely.

Charge to Jury—Error.—Refusal to charge that the jury could consider the failure of plaintiff, suing for personal injuries, to call as witnesses the doctors who examined her shortly after the injury to ascertain her physical condition, is error.

Error to circuit court, Saginaw county; Eugene Wilbur, Judge.

Action by Mary Vergin against the city of Saginaw. From a judgment for plaintiff, defendant appeals. Reversed.

Henry E. Naegely, for appellant.

F. E. Emerick, for appellee.

Montgomery, C. J. The plaintiff recovered a judgment of $730 for injuries received on a defective sidewalk. The plaintiff at the time of her injury was a married woman, 45 years of age, living with her husband and family at 1023 Bond street N., between Bristol and Brewster. Bond street runs east and west, and is paved with cedar blocks and with stone curbing. Bristol street is the street just north of plaintiff's house, and runs east and west, and intersects Bond. Brewster street is the first street south of Bristol. Then there are Miller, Throop, and Clinton streets south in the order named. Porter street runs parallel with Bond, and is one block east of it, and intersects all the streets named, the same as Bond. A Mrs. Fellows lives at the corner of Porter and Clinton streets, and on the evening of April 6th plaintiff, with her daughter, who is a music teacher, left home for the purpose of going to Mrs. Fellows' house. The corner of Por-

Case Stated.

*See note at end of case.

ter and Clinton streets is about four blocks from where plaintiff lives. It is three blocks south and one block east. The plaintiff frequently passed over this walk during the previous summer, fall, and winter in going to the grocery and meat market. She knew the condition of the walk on which she was injured. She was interested in the walk, and in the summer of 1898 she notified Shefnecker, the alderman of the ward, to have this particular place where she was injured repaired. The walk in front of plaintiff's house and south of there and at the point of injury was about four feet wide. The distance from the outside edge of the walk to the street curb was about six feet, and both the walk and this ground between this curb and the walk were covered with snow and ice. Between the sidewalk proper and the curb of the street there is a space of several feet in that block. There were no trees between the sidewalk and the curb, and there were no obstructions of any kind, and there were no holes in the space between the sidewalk and the curb in that block at the time plaintiff was hurt. It was smooth and level between the sidewalk and the curb, except as the snow scraper had thrown up ridges of snow on either side. and except in one place where there was a ditch at the corner of plaintiff's walk extending out to the curb. The snow on each side of the path was probably a foot and a half deep. Plaintiff and her daughter left home the night of the accident for the purpose of going to Mrs. Fellows' house. They left the house, and walked to the street side, when they turned south. The daughter walked ahead in this narrow path, the mother following her. When they had gone about 10 feet, the plaintiff stepped into a hole, and fell, and injured herself. The hole in which she fell was filled with snow and slush, so that the hole was concealed, and the plaintiff could not see it. The snow had not been cleaned off the walk on this lot when she was injured. The walk on the south side of Bristol street between Bond and Porter streets in April and the spring of 1899, and the walk on Porter street from Bristol to Clinton at this time, were good and safe for travel. Defendant's counsel contends that on this testimony it should be held that the plaintiff was guilty of contributory negligence as matter of law. The argument is that the plaintiff, knowing the defect, was at fault in negligently using the defective sidewalk. That the only excuse which she offers is that she did not have the defect in mind at the time of the injury, and it is contended that this excuse is not sufficient. We have had frequent occasion to consider the effect of previous knowledge of a defect in a way or sidewalk as bearing on the question of contributory negligence. In Lowell v. Watertown Tp., 58 Mich. 568, 25 N. W. 517, it was said: "A person is not necessarily precluded from recovering for an injury caused by a defect in a highway simply for the reason that he is aware of said defect; but this fact, with all others, is proper to be

Defective Sidewalk—Knowledge of Defect—Contributory Negligence.

taken into consideration by the jury in determining whether, under all the facts and circumstances, he was guilty of carelessness or negligence without which he would not have been injured." In Dundas v. City of Lansing, 75 Mich. 499, 42 N. W. 1011, 5 L. R. A. 143, it is said: "It is doubtless true, as plaintiff testified, that, had she been at the time on the lookout for this hole in the walk, she might have seen and avoided it; but the question is, was she negligent under all the circumstances and surroundings in not seeing and avoiding it? The darkness of the night, the storm, her anxiety to get home, are all circumstances that should be weighed as bearing upon her conduct upon that occasion. The question is not free from doubt, and, when it is not, it should be submitted to the jury." In Whoram v. Argentine Tp., 112 Mich. 20, 70 N. W. 341, the plaintiff, who had previous knowledge of the defect, but supposed it had been repaired, testified: "After I got into the road, I started the mare into a trot, and she was trotting when I got to the hole. I was thinking about my errand—about my business—when the accident happened. I didn't think about the hole. My mind was intent upon my business." It was held that the question of the plaintiff's contributory negligence was for the jury. In each of the three cases of Black v. City of Manistee, 107 Mich. 60, 64 N. W. 868, Grandorf v. Railway Co., 113 Mich. 496, 71 N. W. 844, Iron v. City of Saginaw, 120 Mich. 295, 79 N. W. 572, in which the plaintiff was held guilty of negligence as matter of law, the defect was in the mind of the plaintiff at the very time of the injury. In Grandorf v. Railway Co. the distinction is noted. In that case it was said: "If this had been a defect of which the plaintiff had simply had previous knowledge, and which knowledge was not in her mind at the time, or if her attention had been diverted from the obstruction, there would be ground for the plaintiff to stand upon." The circuit judge committed no error in submitting the question of plaintiff's contributory negligence to the jury.

Error is assigned on a ruling admitting testimony as to the value of the services of the attending physician, the plaintiff being a married woman. The testimony tended to show that the credit was extended to the plaintiff solely. The ruling is sustained by Lacas v. Railway Co., 92 Mich. 412, 52 N. W. 745.

Action by Married Woman—Medical Services—Evidence.

The defendant's counsel presented the following request: "It appears from the testimony that Drs. Sample and McGregor made examinations of the plaintiff a short time after she claims to have been injured. Dr. McGregor made two examinations, and Dr. Sample made one examination. They were for the purpose of ascertaining her physical condition. The plaintiff has not called these witnesses. Her failure to produce them may be given such weight by you as you see fit." The record discloses that the facts are correctly stated in the request. The

Charge to Jury—Error.

refusal to give the request was error, within the ruling of Cooley v. Foltz, 85 Mich. 47, 48 N. W. 176. For this error the judgment must be reversed, and a new trial ordered. The other justices concurred.

NOTE.

Defective Sidewalks — Injury — Contributory Negligence.—Walking upon a sidewalk which the party knows to be in a dangerous condition does not constitute negligence *per se* but such negligence is a question of fact for the jury. City of Sandwich *v.* Dolan, 133 Ill. 177, 24 N. E. Rep. 526.

In an action against a city to recover for an injury from a defective sidewalk, whether the plaintiff is guilty of contributory negligence or not is a question for the jury. McGrail *v.* Kalamazoo (Mich.), 53 N. W. Rep. 955.

In Jordan *v.* City of Asheville, 16 S. E. Rep. 716, 112 N. Car. 743, which was an action to recover damages on account of injuries sustained by plaintiff stepping into a hole in a sidewalk, it was held that under Acts 1887, c. 33, providing the contributory negligence, when relied on as a defence, in actions for defendant's negligence, cannot be presumed, but must be proven.

In Lynch *v.* City of Erie (Pa.), 25 Atl. Rep. 43, it was held that it was incumbent upon the plaintiff to establish a *prima facie* cause of action resulting exclusively from the negligence of the defendant, or, in other words, a clear case of contributory negligence upon his own part before the defendant need answer at all. See also, Cloney *v.* City of Kalamazoo, 4 Mun. Corp. Cas. 640, and extensive *note*, with full collection of authorities.

KOPELKA

v.

CITY OF BAY CITY.

(*Supreme Court of Michigan, Jan. 29, 1901.*)

[84 N. W. Rep. 1106.]

Defective Sidewalk—Contributory Negligence.*—K. stepped into a small hole in a sidewalk in the night. He and others were accustomed to walk over it daily. There was evidence that the hole was filled with leaves and dirt. The jury viewed the walk, and the nearest electric light, if it was burning, was 300 feet distant. *Held*, that the question of contributory negligence was for the jury.

Error to circuit court, Bay county; Theodore F. Shepard, Judge.

Action by Charles Kopelka against the city of Bay City. Judgment for plaintiff. Defendant brings error. Affirmed.

*See Vergin *v.* City of Saginaw, *ante*, p. 275.

Kopelka *v.* City of Bay City

Plaintiff left his home at half past 9 o'clock on November 29, 1899, to go to a grocery near by to buy some tobacco, stepped into a hole in the sidewalk, about 12 inches long by 6 or 8 inches wide, fell, and fractured his ankle. Plaintiff worked in a lumber yard near by, and had for several years walked over this sidewalk to and from his home every day. It was in bad condition. The negligence of the defendant is conceded, unless it was under no obligation to look after the walk. The sole defense is, assuming the defendant is liable for the condition of the walk, that the plaintiff knew of its condition, and that it was so bad that he had no right to walk over it, but should have walked in the street, or passed over to the sidewalk on the other side. The city employed two men in every ward to look after the sidewalks, but they had not reported or repaired this one. Policemen were also required to notify them of all holes throughout the city, but no notice of this hole had been given. Mr. Orr, the city attorney, was called as a witness by the plaintiff. He went to see the sidewalk the second day after the accident. He described its condition as follows: "The hole, I think, was between the fourth and fifth boards. There were no boards broken. There were three stringers under the sidewalk. The sidewalk was from two and a half to three inches from the ground at the bottom of the planks, by measurement. The highest that the sidewalk was above the ground was three inches. Some places it almost touched the ground. I will further say, at the time I noticed the electric light. There were no leaves on the trees at all. The electric light was about three hundred feet south of there. Standing on the end of the sidewalk, and stooping down so you could look at the light, the light would shine squarely just past the first tree on the corner, and right down on the sidewalk. Q. How large was this hole in the walk? A. The hole, I should judge, was perhaps six or eight inches, may be eight inches wide at the widest part, and, I should judge, not more than a foot long. Q. Did it go down far? A. No; while I was there it was filled up with dirt and leaves and stuff that had apparently gathered in there and filled it up, so that where the hole actually was, up to the bottom of the planks, it was newly-made dirt and leaves that had fallen in. Q. This hole was the only defect you observed in the surface? A. It was the only hole in the sidewalk at that time." Plaintiff testified that he did not know whether the electric light was burning at the time or not. While various witnesses testified to the bad condition of this sidewalk, yet they all used it. Just how long the hole had been there is not shown. Besides the testimony appearing upon the record, the jury, at the request of the defendant, were sent to view the sidewalk and the situation. They were therefore in position to determine whether the electric lights which the defendant claims were burning on the night in question would shine upon the sidewalk so as to disclose the hole.

Brakie J. Orr, for appellant.

Isaac A. Gilbert, for appellee.

Grant, J. (after stating the facts). 1. It is conceded that the sidewalk was then within and a part of the public highway. As between the public and the city, the latter was responsible for its condition, and liable for injuries resulting from its negligence to keep it in repair. It is immaterial whether the walk was constructed with or without the order of the counsel.

2. Complaint is made of the following instruction: "If, under the circumstances as they appeared, and as detailed to you, he [the plaintiff] may not have deemed it to be unsafe and dangerous to walk on, and he thought it was proper and suitable for him to walk there, and you find he was justified in using it as he did, then, that place having remained there so long, it was the duty of the city to have put it in repair; and the city, so far as that is concerned, not having put it in repair, in a case a person is injured without fault on their part the city would be liable." The objection urged is that the jury would infer that the plaintiff was the one to determine whether he considered the sidewalk safe for him to walk over. Taken in connection with the entire charge, we do not think it possible that the jury could have so understood the instruction. In another part of his charge the court expressly said that if the plaintiff saw or knew of the dangerous place, and there was a safe place right beside it of which he could avail himself, he should have done so. We think, taking the charge altogether, it was a correct exposition of the law.

3. The question of contributory negligence was for the jury to determine. The case is controlled by Germaine v. City of Muskegon, 105 Mich. 217, 63 N. W. 78; Schwingschlegl v. City of Monroe, 113 Mich. 685, 72 N. W. 7; Urtel v. City of Flint (Mich.) 80 N. W. 991. See, also, Sias v. Village of Reed City, 103 Mich. 312, 61 N. W. 502; Crites v. City of New Richmond, 98 Wis. 55, 73 N. W. 322.

Some questions are raised upon the admission of testimony, bearing upon the question of damages. Considering the smallness of the verdict, we do not think it possible to find that the jury were prejudiced by its admission, even if it should have been excluded. We think the case was fairly tried, and it is affirmed. The other justices concurred.

KING

v.

COLON TP.

(*Supreme Court of Michigan, Jan. 29, 1901.*)

[84 N. W. Rep. 1077.]

Defective Sidewalk—Contributory Negligence.*—K., a girl 14 years old, had passed a hole in the public highway for several weeks twice a day;

*See Vergin *v.* City of Saginaw, *ante*, p. 275.

knew its existence; had avoided it every time she passed it previous to the accident; stepped into it in broad daylight. There was nothing to hinder her from seeing it, and she testified that if she had been looking she would have seen it. *Held*, that she was guilty of contributory negligence, and could not recover.

Error to circuit court, Kalamazoo county; George M. Buck, Judge.

Action by Mary King, by David King, her next friend, against the township of Colon. Judgment for plaintiff, and defendant brings error. Reversed.

On June 1, 1889, plaintiff, then 14 years of age, on her way home from school stepped into a hole in the public highway, by reason of which she claims to have received injury. Nearly 5 years afterwards she instituted this suit, through her father, to recover damages therefor. At the place of the accident the land was low. It had been filled in, and a tile put through the fill to allow the passage of water. In the north wheel track the tile had been broken in, leaving a hole about 18 inches deep. This had existed for some months. Plaintiff testified that she was walking forward when she stepped into the hole. A schoolmate testified that she and plaintiff were running a race backward when she stepped in. She walked home, a mile and a half, after the accident, without difficulty. It is claimed by the defendant that the injury from which she suffered was caused afterwards, by a horse stepping upon her foot. This claim is sustained by several disinterested witnesses, but denied by plaintiff. Her own testimony as to the manner of the accident is as follows: "The hole in the tile was broken through in the fall or early spring of '88 or '89. It might have been before that time. I noticed the hole some time before I stepped into it, having passed it twice each day during the school days. I went to school in the morning and came home in the afternoon of that day, and the hole was perfectly visible, and I had no difficulty in seeing it was there, and I had no difficulty in seeing where the wagon tracks were. On this day the school let out at 4 o'clock in the afternoon, and I started home as soon as it was out, and it was probably fifteen or twenty minutes after 4 when I got to the place where the hole was in the tile. It was some time the latter part of May or in June, and it was broad daylight. There was nothing to hinder me from seeing the hole, and if I had been looking down at the ground I would have seen it, as I had known that it was there for a long time, and there was plenty of room to go around the hole. I had walked around it day in and day out as I passed. There might have been some difficulty if I had followed directly in the wagon tracks in passing the hole, as there was a mud puddle, and there would have been no difficulty about getting by there without getting into the hole. I was paying absolutely no attention to where I walked. I do not know as I thought about the mud puddle being there."

Howard, Ross & Howard and H. P. Stewart, for appellant.

Alfred Akey and D. L. Akey, for appellee.

Grant, J. (after stating the facts). I have examined all the negligence cases decided by this court—and they are many—against townships and cities for defective highways and sidewalks. I find none which presents the exact question now before the court. Plaintiff knew of the defect. It was apparent to any one. Travelers by carriage had made a new wheel track around it. She had passed it twice nearly every day for weeks. She was a girl of sufficient age and intelligence to, and did, appreciate the danger, and the necessity of avoiding the hole. She knew she was in its vicinity. She knew that a single glance would show her where it was, and that there was not the slightest difficulty in avoiding it, as she had always done before. If plaintiff's contention be the law, then the familiar rule that what one can, by the exercise of the slightest prudence or care, see, he must be held to have seen, does not apply to persons traveling in our public highways and streets. No excuse is given, except that she did not look. Is there no duty imposed upon travelers to look when they are traveling upon the public highways, in the very presence of known defects and danger? The court charged the jury that "it was the duty of Mary King, in passing along, to use ordinary care and prudence, and this care and prudence must be commensurate with the fact that she knew the hole was in the road; and if, by the exercise of ordinary care and prudence, she could have avoided it, she could not recover." Where can a jury find acts of care and prudence where one walks into a known dangerous place without looking? The court further said to the jury: "The defendant claims that the plaintiff was not in the exercise of ordinary care; that she knew of the defect in the highway; that she paid no attention to it; that she was running a foot race backward at the time she stepped into this hole. If you find that the claim of the defendant is true, then, however negligent the township may have been, she could not recover." The first two facts referred to in the above instructions, viz. that she knew of the defect and paid no attention to it, were admitted. The third alone was denied. Under this branch of the charge the jury would have been justified in finding that if she was not running a foot race backward she was entitled to recover. What is the difference in result or in principle between walking backward into a known and apparent danger, and walking forward into the same danger without a thought or a look? What is the difference in result or in principle between walking forward into the same danger with one's eyes shut, or open without looking? The only theory upon which this verdict can be sustained is that it is not negligence to walk on a public highway, in the presence of a known dangerous defect, without thinking and looking. This, in fact, was the theory of the charge. Why should it be negligence

to walk backward? This is one of the common sports of children even older than plaintiff. And, if she had walked into this hole while reading a book,—and reading books while walking is no uncommon thing,—would this have excused her? If, instead of this hole, one or two planks had been removed from a bridge to prevent teams from passing over it on account of a defect, but persons could safely pass over upon the stringers or a single plank laid over the hole, could a person recover damages for falling into such hole in broad daylight, upon the statement that he was aware of the opening, but did not think of it? There is no decision in this state which leads to such a conclusion. If there is, it ought, in my judgment, to be overruled. In all the cases there are circumstances surrounding the transaction to excuse the act of the plaintiff in getting upon the dangerous place. Plaintiff relies largely upon Dundas v. City of Lansing, 75 Mich. 499, 42 N. W. 1011, 5 L. R. A. 143. The accident in that case happened in the nighttime. It was held that the darkness of the night, the storm, and her (plaintiff's) anxiety to get home were all circumstances that should be weighed by the jury as bearing upon her conduct. No such excusatory circumstances exist in this case. In Graves v. City of Battle Creek, 95 Mich. 266, 54 N. W. 757, 19 L. R. A. 641, the accident occurred in the nighttime. Plaintiff, a woman, as an excuse for stumbling over a loose plank, which she might have seen, testified that just before she stumbled she heard a whistle, and became frightened and hurried on. It was held that the court should have submitted to the jury the question of whether this circumstance, coupled with the fact that it was in the nighttime, was sufficient to excuse her immediate attention to the walk at the exact time of the injury. In Lowell v. Watertown Tp., 58 Mich. 568, 25 N. W. 517, the accident happened on a dark and misty night, while plaintiff was walking along the highway. He knew of the defect,—a hole about a foot square,—and had it in mind. Held, that the question of contributory negligence was for the jury, under all the facts and circumstances. The rule is well stated by Justice McGrath in Dittrich v. City of Detroit, 98 Mich. 245, 248, 57 N. W. 125: "While contributory negligence is not to be presumed from the knowledge of the existence of the defect, such knowledge enjoins upon a party a degree of care commensurate therewith." In Grandorf v. Railway Co., 113 Mich. 496, 71 N. W. 844, plaintiff was held to have assumed the risk in passing over defective stones which she saw scattered across the walk. Could she have recovered had she testified that she did not see them, though it was broad daylight? Would she have been excused by testifying that she was not thinking of the situation, and therefore did not look? We might comment upon many other cases decided by this court, but do not deem it necessary. An examination of them will show how they differ in their facts from this case. Dillon thus states the rule: "The ordinary

rules as to contributory negligence and its effect upon the right of recovery apply to cases such as we are now considering. Adverting in this place to the subject in a general way, it may be stated that if the person injured knew of the defect or obstruction, and ought reasonably to have avoided it by going outside or around it, and did not, he cannot recover." 2 Dill. Mun. Corp. 1007. In Casey v. City of Malden, 163 Mass. 507, 40 N. E. 849, a boy 7 years old stepped backward into a manhole in the street. The hole was in plain sight, if the plaintiff had looked. Held, that he voluntarily adopted a dangerous method in crossing a public street, and his injury was a natural consequence of his carelessness. Would he not have been equally negligent if he had walked forward into the hole without looking? In Dale v. Webster Co., 76 Iowa, 370, 41 N. W. 1, plaintiff, while crossing a bridge at night, reading a letter by the use of his lantern, fell from a defective bridge. He was held guilty of contributory negligence. The negligence would certainly have been as great had he walked into the defect in the daytime while reading. The law does not excuse one for not looking when he knows of the danger, and may by a glance see it and avoid it. It would be a dangerous doctrine that one injured in the public highway in broad daylight may excuse himself by saying: "It is true that I knew of the dangerous place; that I was in close proximity to it; that I might have seen it had I looked. But I did not think of it, and therefore did not look." I find no case which lays down such a rule of law. Judgment reversed, and, inasmuch as no different case can be made upon a new trial which would not be wholly inconsistent with plaintiff's case as here made, none will be granted. The other justices concurred.

CITY OF SOMERSET

v.

SOMERSET BANKING CO.

(Court of Appeals of Kentucky, Dec. 21, 1900.)

[60 S. W. Rep. 5]

Quorum—Mayor and Councilmen.*—Where a council consists of six members, with the mayor as presiding officer, the mayor and three of the councilmen do not constitute a quorum, and their acts are void.

Vacancy in Council—Appointment.—Where less than a quorum of a city council attempted to fill a supposed vacancy in the council when none in fact existed, their appointee was not a *de facto* officer, though he qualified and acted as councilman, as the person whose place he was appointed to fill, though he failed to attend the meetings of the council, continued to be councilman, both *de facto* and *de jure*.

*See note at end of case.

City of Somerset *v.* Somerset Banking Co

Statutory Provision—Expulsion of Member.—Under Ky. St. § 3486, providing that three-fourths of the members of the council of a city of the fourth class voting affirmatively may, for any good cause, expel any member, the act of less than that number of members declaring vacant the seat of a member for his willful failure to attend the meetings of the council does not create a vacancy.

Tax Levy.—A tax levied by less than a quorum of a city council is void.

Same—Specific Purpose.—Under Const. § 180, an order of a city council levying a tax is void unless it distinctly specifies the purpose for which the tax is levied.

Same—Void Tax—Subsequent Levy.—Where a tax levy made by a city council is void for failure to specify the purpose for which the tax was levied, the council may subsequently make a proper levy.

Pleadings—Set-Off.—A set-off cannot be pleaded against the claim of a city for taxes.

Provision of Statute—Right of City to Sue.—Under Ky. St. § 3546, a city of the fourth class may sue for taxes.

Appeal from circuit court, Pulaski county.

"To be officially reported."

Action by the city of Somerset against the Somerset Banking Company to recover taxes. Judgment for defendant, and plaintiff appeals, defendant prosecuting a cross appeal. Affirmed on original appeal and reversed on cross appeal.

O. H. & R. B. Waddle and Elbert Weslen, for appellant.

Curd & Smith and Jas. Denton, for appellee.

Hobson, J. Appellant, the city of Somerset, filed this suit to recover of appellee, the Somerset Banking Company, municipal taxes alleged to be due from it for the years 1895, 1896, 1897, 1898, and 1899. The action was dismissed without prejudice as to the years 1895 and 1896. On final hearing the court below gave judgment in favor of the city for the taxes for the year 1897 and the year 1899, but dismissed the action as to the taxes for the year 1898. From this judgment the city has appealed, and the banking company has prosecuted a cross appeal.

Case Stated.

The ruling of the court that no recovery could be had for the taxes for the year 1898 appears to be based on the ground that the levy for that year was not made by a legal quorum of the city council. The facts in this matter are these: At the November election, 1897, a mayor and six councilmen were elected. All of them qualified and entered upon the discharge of their duties as required by law, but after January 14, 1898, three members of the council absented themselves from all of its meetings. This continued until June 13, 1898, when the mayor and the other three members of the council, who had continued to meet, in regular session adopted a resolution declaring the seat of T.

Quorum—Mayor and Councilmen.

J. Curtis, one of the three absentees referred to, vacant on account of his willful failure and refusal to attend the meetings of the board for four months previous thereto. They thereupon elected M. T. Crawford to fill the vacancy, and at the next meeting Mr. Crawford presented his certificate, and was regularly qualified as a member of the board. At the next meeting—on July 11th—the seats of the other two absentees were declared vacant and filled in like manner. By the council, as thus composed, on August 22d, the levy in question was made. It was held by this court in City of Somerset v. Smith (Ky.) 49 S. W. 456, that the mayor and three councilmen do not constitute a quorum, and that a contract entered into by the council thus constituted is invalid; and, as only the mayor and three councilmen were present when Curtis' seat was declared vacant, it is insisted for appellee that the action of the council was void for want of a quorum, and that Crawford and the other two similarly appointed subsequently were merely intruders, and that the levy, not having been made by a legal quorum of the council, is not enforceable. On the other hand, it is insisted that Crawford was at least a de facto officer, and that the action of the council in filling the other two vacancies, in which he co-operated, was not void for want of a quorum. It is clear that, if Crawford was not a de facto officer, his presence at the election of the other two would not help matters, and their presence and his when the tax was levied would be equally unavailing. The material question in the case is, therefore, was Crawford a de facto officer, he having regularly qualified, and having been recognized by the other members of the council as councilman? It will be observed that, the action of the council in removing the absentee, Curtis, being void, Curtis, who had qualified, and entered upon the discharge of his duties, continued to be both a de facto and a de jure officer, and that there was no vacancy for the council to fill. The substance of the case is that less than a quorum of the council undertook to put another in Curtis' seat. The recognition of Crawford by the three councilmen and the mayor who had appointed him, and their acquiescence in his acting as councilman, conferred on him no right, for they could not, by their conduct, do indirectly what they could not do directly. In Mechem, Pub. Off. § 322, it is said: "It is evident that two different persons cannot at the same time be in the actual occupation and exercise of an office for which one incumbent only is provided by law. There cannot, therefore, be an officer de jure and another officer de facto in possession of the same office at the same time. Hence, if the officer de jure is in, there is no room for an officer de facto; and, if the officer de facto is in, the officer de jure cannot be in also." In State v. Blossom, 19 Nev. 312, 10 Pac. 430, while there were regular school trustees, others acted, and sought to sustain their action on the ground that they were

Vacancy in Council—Appointment.

de facto officers. The court said: "Two physical bodies cannot occupy the same space at the same time, and two persons cannot be officers de facto for the same office at the same time." This question was fully considered in Re Gunn, 50 Kan. 155, 32 Pac. 470, 548, 19 L. R. A. 519, where the supreme court of Kansas, by Horton, C. J., collecting many authorities, announced the same rule. It seems to us a sound one, and under it Crawford was a mere intruder into the office, and had no more right to discharge the duties of councilman than any bystander who might be present and take Curtis' seat at a meeting of the council when he was not present. If Curtis had come to the meeting of the council on July 11th, or at the subsequent meeting when the levy in question was made, it is clear that he would have been entitled to his seat, and that Crawford would not have been justified in withholding it from him. We know of no principle of law upon which one may become a de facto member of the city council in the absence of the regular councilman. Our conclusion is, therefore, that the court below did not err in holding the levy for 1898 void.

Statutory Provision—Expulsion of Member.

Section 3486 of the Kentucky Statutes, which contains the only power of the board in this matter that we have found, provides as follows: "In case of a vacancy in the board by death, resignation, or any other cause, such vacancy shall be filled as hereinafter provided. The board shall meet at such times and places as shall be provided by ordinance. It shall judge of the eligibility and election returns of its members, adopt rules for its proceedings and government and enforce the same by appropriate fines, not exceeding ten dollars for each offense; and three-fourths of the members voting affirmatively may for any good cause expel any member." As we have said, there was no vacancy to be filled. Three-fourths of the members were not present, and did not vote to expel Curtis. The officers elected by the people when they have qualified and entered upon a discharge of their duties can only be removed pursuant to legal authority. It follows, therefore, that the court below did not err in dismissing the action as to the taxes for the year 1898, and the judgment appealed from on the original appeal is affirmed.

The cross appeal raises the question whether the tax levies made by the council for the years 1897 and 1899 are sufficient in form to be enforced. Section 3490, Ky. St., confers upon the council, among other things, power as follows: "To levy and collect for municipal purposes an annual ad valorem tax not exceeding seventy-five cents on every hundred dollars of all property made taxable by law for state purposes; in addition not exceeding fifty cents on the hundred dollars worth of property taxable for state purposes, for the maintenance of public schools, or the erections of buildings for public school purposes; and not exceeding fifty cents to meet the principal and interest of any bonded debt hereinafter authorized." "To levy and collect annually upon

Tax Levy.

every male resident of the city twenty-one years of age or over a head or personal tax of not exceeding one dollar and fifty cents per capita." Section 180 of the constitution is in these words: "The general assembly may authorize the counties, cities or towns to levy a poll tax not exceeding one dollar and fifty cents per head. Every act enacted by the general assembly and every ordinance and resolution passed by any county, city, town or municipal board or local legislative body levying a tax, shall specify distinctly the purpose for which said tax is levied and no tax levied and collected for one purpose shall ever be devoted to another purpose." The order of the council levying the tax for 1897 is this: "E. M. Rousseau made a motion to fix the tax levy at seventy-five cents on each one hundred dollars, and one dollar poll. The motion was seconded by R. Kolker, and carried on a call of yea and nay." The order levying the tax for the year 1899 is as follows: "Mr. E. M. Porch made a motion to fix the tax levy for the year 1899 seventy-five cents on each one hundred dollars, and one dollar poll. Motion was seconded by J. B. Thornton, and carried on a call of yea and nay." It is clear that neither of these orders specifies distinctly the purpose for which the tax was levied, as required by the constitution. While this court has followed the rule of holding municipalities to no great minutiæ in specifying the purposes of the levy (Cahill v. Perrine, 49 S. W. 344; Pulaski Co. v. Watson, 50 S. W. 861), we are unable to know for which of the purposes named in the statute those levies were made, or whether they were designed to cover them all; and we think they are clearly in violation of the constitutional requirement above quoted, which is mandatory, and must be obeyed. We are, therefore, of opinion that the levies in question are void; but it does not follow that the city is without remedy. If the council has, by inadvertence or neglect, failed to perform a duty imposed upon it by law at the proper time, it may yet perform it. The city government has been established for the reason that it was deemed necessary for the peace and good order of the community, and a mere mistake of the council will not be allowed to destroy the government, or cripple its efficiency. Where the council has failed to make a proper levy it may subsequently do so. This was determined in Levi v. City of Louisville, 97 Ky. 394, 30 S. W. 973, 28 L. R. A. 480, and the conclusion announced in that case is supported by the great weight of authority.

Same—Specific Purpose.

Same—Void Tax—Subsequent Levy.

The only other question necessary to consider relates to a set-off pleaded by the appellee, consisting of a judgment in its favor against the city. Section 96 of the Code of Practice thus defines a set-off: "A set-off is a cause of action arising upon a contract, judgment or award in favor of a defendant against a plaintiff or against him and another; and it cannot be pleaded except in

Pleadings—Set-Off.

Note

an action upon a contract, judgment or award." If under section 3546, Ky. St., this may be regarded an action upon a contract, we are still of opinion that the set-off relied upon cannot be maintained. It has been held that a set-off cannot be maintained against the state. Mason v. Com. (Ky.) 36 S. W. 570; Kentucky Chair Co. v. Com. (Ky.) 49 S. W. 197. The same rule should apply to set-offs against taxes due to municipalities. The law requires the municipal government to be carried on, and, if the municipality may be deprived of its revenue in this way, the efficiency of the government may be destroyed. The constitution, as we have seen, forbids taxes levied for one purpose from being appropriated to another, and, if such set-offs were allowed, hopeless confusion might ensue. The proper remedy for the collection of such judgments is by mandamus against the city authorities. By section 3546, Ky. St., the city is authorized to proceed by action for the collection of unpaid taxes. On the cross appeal the judgment is reversed, and cause remanded for further proceedings consistent with this opinion. Whole court sitting.

Provision of Statute—Right of City to Sue.

NOTE.

Quorum—What Constitutes—General Rule.—As a general rule, the power that creates a municipal corporation fixes the number of the members that shall constitute the quorum. The quorum of a body may be defined to be that number of the body which, when assembled in their proper place, will enable them to transact their proper business; or, in other words, that number that makes the lawful body, and gives them the power to pass a law or ordinance. But when the statute law creating such body is silent as to what shall constitute a legal assembly, the common law both in England and in this country is well settled that the majority of the members-elect shall constitute the legal body. Heiskell *v.* Mayor, etc., of Baltimore (Md.), 12 Am. & Eng. Corp. Cas. 347; Blacket *v.* Blizard, 9 Barn. & C. 851; Scraper *v.* Pipes, 59 Ind. 158; Evans *v.* Gravel Road Co., 51 Ind. 160; State *v.* Wilkerville Tp., 20 Ohio St. 288; McFarland *v.* Crary, 6 Wend. (N. Y.) 297; Price *v.* Railroad Co., 13 Ind. 58; City of Logansport *v.* Legg, 20 Ind. 315; State *v.* McMullen, 46 Ind. 307; State *v.* Porter, 113 Ind. 79, 14 N. E. Rep. 883; Barnett *v.* Paterson, 48 N. J. L. 395, 6 Atl. Rep. 15; McDermott *v.* Miller, 45 N. J. L. 251; Buell *v.* Buckingham, 16 Iowa 284; Cadmus *v.* Fagan, 47 N. J. L. 208, 4 Atl. Rep. 323; Miller *v.* Gleason, 11 Wis. 470; State *v.* Green, 37 Ohio St. 227; Regents, etc., *v.* Williams (Md.), 9 Gill & Johns. 365; Strohm *v.* Iowa City, 47 Iowa 42; Coles *v.* Williamsburgh, 10 Wend. (N. Y.) 659; Warnock *v.* La Fayette, 4 La. Ann. 419; San Francisco *v.* Hazen, 5 Cal. 169; McCracken *v.* San Francisco, 16 Cal. 591; Oakland *v.* Carpenter, 13 Cal. 540; Damon *v.* Granby, 2 Pick. (Mass.) 352; Kingsbury *v.* Centre School Dist., 12 Met. (Mass.) 99; Price *v.* Grand Rapids & I. R. Co., 13 Ind. 58; State *v.* Deliesseline, 1 McCord (S. Car.) 52; Com. *v.* Read, 2 Ashm. (Pa.) 261; State *v.* Green, 37 Ohio St. 227; State *v.* Huggins,

Harper, L. (S. Car.) 139; Rex *v.* Miller, 6 T. R. 268; Rex *v.* Bellringer, 4 T. R. 810; Rex *v.* Headley, 7 Barn. & C. 496.

In the case of Coles *v.* Trustees, 10 Wend. 659, "three of five town trustees were disqualified from voting, and there was, of course, no quorum of competent members, and consequently no capacity to act. The court said: 'The act requires three out of the five, or a majority, to make a quorum. If there were but three present, then the votes of two, being a majority, would be valid. Here were five trustees, three of whom were incompetent to vote, by the act; and being so, it seems to me, so far as the vote was concerned, they were not trustees for any purpose.'" Warnock *v.* City of La Fayette, 4 La. Ann. 419; Hamilton *v.* State, 3 Ind. 552; Downing *v.* Rugar, 21 Wend. 182; Small *v.* Orne, 79 Me. 78, 8 Atl. Rep. 152; State *v.* Green, 37 Ohio St. 227; Launtz *v.* People, 113 Ill. 137; County of Cass *v.* Johnston, 95 U. S. 369; St. Joseph Tp. *v.* Rogers, 16 Wall. (U. S.) 644; State *v.* Renick, 37 Mo. 270; Everett *v.* Smith, 22 Minn. 53; Oldknow *v.* Wainwright, 2 Burrows 1017; King *v.* Bellinger, 4 Term. R. 810; Inhabitants *v.* Stearns, 21 Pick. (Mass.) 148.

STATE OF MISSOURI, Complainant,

v.

STATE OF ILLINOIS and Sanitary District of Chicago.

(*Submitted April 30, 1900. Ordered for oral argument May 21, 1900. Argued November 12, 13, 1900. Decided January 28, 1901.*)

[21 Sup. Ct. Rep. 331.]

Controversy between States—City as Agent of State—Jurisdiction of Supreme Court.—The construction by a public corporation, as an agency of the state, of a system of public works to promote the health and prosperity of its inhabitants, but which endangers the health and prosperity of the inhabitants of another and adjacent state, furnishes a sufficient basis for a controversy between the states, of which the Supreme Court of the United States can take original jurisdiction.

Drainage as Nuisance—Equitable Relief.—The threatened daily transportation by the Sanitary District of Chicago, by artificial means and through an unnatural channel, of large quantities of sewage and of accumulated deposits which will poison the water supply of inhabitants of the state of Missouri, and injuriously affect that portion of the bed or soil of the Mississippi river which lies within its territory, entitles that state to maintain a suit for equitable relief, in advance of any actual injury sustained thereby.

Acquiescence by State as Bar to Relief.—Acquiescence by the state of Missouri in the proceedings of the Sanitary District of Chicago in devising and carrying out a system of sewerage is no bar to relief against the continuous pouring of sewage and filth into the Mississippi river through a drainage canal constructed by the sanitary district, to the detriment of the state of Missouri and her inhabitants.

Missouri *v.* Illinois

Original Bill by the State of Missouri against the State of Illinois and the Sanitary District of Chicago to prevent the discharge of sewers into the Mississippi river. Demurrers to bill overruled.

Statement by Mr. Justice Shiras:

Case Stated.

In January, 1900, the state of Missouri filed in this court a bill of complaint against the state of Illinois and the Sanitary District of Chicago, a corporation of the latter state, in the following terms:

"The complainant, the state of Missouri, and one of the states of the United States, brings this its bill of complaint against the state of Illinois, one of the states of the United States, and the Sanitary District of Chicago, a public corporation organized under the laws of the state of Illinois, and located in part in the city of Chicago, and in the county of Cook, in said state of Illinois, and a citizen of the state of Illinois.

"And your orator complains and says that it is a state containing a population of upwards of three millions of people, and lying on the west bank of the Mississippi river, a public, navigable, and running stream, and having a frontage on said stream of over 400 miles.

"And your orator shows that by the act of Congress providing for the organization and admission of Illinois and Missouri as states of the Union it was declared that the western boundary of Illinois and the eastern boundary of Missouri should be the middle of the main channel of the Mississippi river; that the shores of the Mississippi river, where its waters form the Missouri and Illinois boundary, and the soil under the water thereof, were not granted by the Constitution of the United States, but were reserved to the states of Illinois and Missouri respectively.

"And your orator shows that the states of Missouri and Illinois each have concurrent general jurisdiction over the waters of the Mississippi river forming the boundary between them, and each of said states has exclusive territorial jurisdiction over that portion adjacent to its own shore; and your orator shows that the Illinois river empties into the Mississippi river at a point above the city of St. Louis, on the Illinois side of said Mississippi river.

"And your orator further shows that within the territory of your orator, and on the banks and shores of said Mississippi river, and below the mouth of the Illinois river, are many cities and towns in the state of Missouri, and many thousands of persons who are compelled to and do rely upon the waters of said river, in their regular, natural, and accustomed flow, for their daily necessary supply of water for drinking and all other domestic and agricultural and manufacturing purposes, and for watering stock and animals of all kinds, and that said Mississippi river has been flowing in its regular course and has

been used for the purposes aforesaid by the inhabitants of the said state of Missouri for a time whereof the memory of a man runneth not to the contrary, and that said river and its waters and the use thereof for drinking, agricultural, and manufacturing purposes, in their accustomed and natural flow, are indispensable to the life and health and business of many thousands of the inhabitants of the state of Missouri, and of great value to your orator as a state.

"And your orator shows that cities and towns below the mouth of said Illinois river, within the territory of your orator, do and are compelled, by means of waterworks, water towers, and intakes, built and constructed for that purpose, to supply the inhabitants of said cities and towns with an adequate supply of pure and wholesome water fit and healthful for drinking and all other domestic purposes and uses, from the said Mississippi river so flowing in its ancient, accustomed, and natural course.

"And your orator shows that said waterworks system are constructed with reference to said Mississippi river and for the purpose of taking water therefrom, and not from any other source.

"And your orator shows that said waterworks to-wit, in 1889, the state of Illinois enacted a law known as the sanitary district act, together with an act for the improvement of the Illinois and Des Plaines rivers, and that under said act of said state the said corporation known as the said Sanitary District of Chicago was organized and is now existing and operating, and that by the express terms of said act any canal or drain corporation organized in accordance with its provisions may have conditions, restrictions, or additional requirements placed in said corporation, or the act authorizing the creation of said corporation may be amended or repealed, and that by the express provisions of said act, before any water or sewage shall be admitted into any channel constructed under said act the trustees of said channel shall notify the governor of Illinois of the completion of said channel, and the governor of Illinois shall appoint three commissioners to examine said canal or channel, and report to the governor if the same complies with the act of the state of Illinois; and if it does, the governor shall authorize the water and sewage to be turned into said channel; and that without the said permit it cannot be so turned in; and that by the general provisions of said act said channel is at all times subject to the control and supervision of the state of Illinois and her authorities.

"And your orator further shows that the Chicago river is situated in the basin of Lake Michigan, and has two forks or branches flowing through the city of Chicago and into Lake Michigan, and that the natural drainage of Chicago, Illinois, is into Lake Michigan, and the sewage and drainage of the territory embraced in the defendant's district, the Sanitary

District of Chicago, is led into or flows into the Chicago river and Lake Michigan.

"And your orator further shows that the defendant herein, the Sanitary District of Chicago, with the authority of the state of Illinois, and acting as a governmental agency of said state, and under the supervision and control and subject to the approval of the state of Illinois, has constructed a channel or open drain from the west fork of the south branch of the Chicago river, in the city of Chicago and county of Cook, in the state of Illinois, to a point near Lockport, in the county of Will, in said state, where said channel or drain connects with and empties into the Des Plaines river, which empties into the Illinois river, and which latter river flows and empties into the Mississippi river at a point distant about 43 miles above the city of St. Louis, Missouri.

"And your orator further states that the channel built by the Sanitary District of Chicago was so built by said sanitary district as one of the governmental agencies of the state of Illinois, and by the pretended lawful authority of said state, and under the direction, supervision, and control and governmental power of the state of Illinois, and which said state has heretofore at all times sanctioned, and now, through its governor and other officers, sanctions the building of said channel and opening thereof.

"And your orator further shows that in the construction of said channel or drain the defendant, the Sanitary District of Chicago, Illinois, with the sanction and approval of the state of Illinois, cut through the natural bridge or watershed which divides the basin of Lake Michigan from the basins of the Des Plaines and Illinois rivers and the basin of the Mississippi river, and that having so constructed said channel, and having about completed the same, and having, under the supervision of and with the sanction of the state of Illinois, extended said artificial channel through said natural divide of the watershed, the defendants now propose and threaten to receive into said channel or drain the sewage matter and filth of the Sanitary District of Chicago, which embraces nearly the whole city of Chicago and a portion of the county of Cook, and, without any legal authority so to do, has already in part effectuated its said threat and purpose, and threatens to permit and to cause said sewage and filth, by artificial means of pumping and otherwise, to flow through the channel or drain towards and into the said Des Plaines river and eventually into the Mississippi river, thereby, with the approval of and subject to the inspection and control and supervision of the state of Illinois, and by the pretended authority thereof, reversing the natural flow of said Chicago river.

"And your orator further shows that the sewage matter and poisonous filth which it is thus threatened to receive and to permit and to cause to flow through said artificial channel into said Des Plaines river is that which is created by a population of

upwards of one and one half millions of people, besides that which is created by a great number of stock yards, slaughtering establishments, rendering establishments, distilleries, and other business enterprises and industries lining both sides of the Chicago river, producing filth and noxious matters; all of which are there discharged into the said Chicago river or drained therein from the surface.

"And your orator further shows that for many years past the said city of Chicago, the greater portion of which is embraced in the limits of the defendant corporation, the Sanitary District of Chicago, as aforesaid, has been discharging its sewage matter and filth into the Chicago river and into Lake Michigan in such large quantities that much of it has accumulated in the bed and along the sides of the river and upon the bed of said Lake Michigan, near the shores thereof, and that the plan threatened and attempted now to be adopted by the defendant, the Sanitary District of Chicago, acting in conjunction with and subject to the control of the defendant, the state of Illinois, and by the pretended authority of the said state of Illinois, will loosen said accumulated matter and filth, and will also direct it and cause it to flow towards and into said artificial channel or drain, and thence into said Des Plaines river, and finally into the Mississippi river and into the waters thereof within the jurisdiction and under the control of your orator and past the homes of the inhabitants of your orator and the towns and cities within the borders of your orator, and past the waterworks of said cities and towns within the state of Missouri.

"And your orator further shows that the amount of said undefecated filth and sewage and poisonous and unhealthful and noxious matters proposed to be, and now about to be, permitted to be turned into said artificial channel and through said Des Plaines and Illinois rivers into the Mississippi river from the said Sanitary District of Chicago by the defendants, acting jointly, will amount daily to about 1,500 tons, and that if defendants should be permitted to carry their said threats into execution, and should cause said above amount of undefecated sewage and other poisonous and noxious matters, which would otherwise flow into Lake Michigan, to flow into the Mississippi river, that the waters of the Mississippi river within the jurisdiction of your orator will of a certainty be poisoned and polluted and rendered wholly unfit and unhealthful for drinking and domestic uses, and will render wholly valueless and entirely worthless the various waterworks system of towns and cities on the borders of the state of Missouri established and acquired at great cost and expense, and will deprive your orator, the state of Missouri, and its inhabitants, of the right to use of the waters of said river for drinking and all other domestic and manufacturing and agricultural purposes, as said water has been so used in its accustomed and natural flow heretofore for the length of time that the memory of man runneth not to the contrary thereof.

"And that said threatened action of the defendants will amount to a direct and continuing nuisance, and be an interference with the use by your orator and its inhabitants of the waters of the Mississippi river flowing in their natural state, polluting and poisoning the same by the means aforesaid, whereby the health and lives of the inhabitants of your orator will be endangered and the business interests of said state will be greatly and irreparably injured, and which said damage to the lives and health and the business interests of said state resulting from said poisoning and polluting of said waters as aforesaid to your orator cannot be estimated in money value.

"And your orator on information and belief states and charges the fact to be that said 1,500 tons of poisonous undefecated filth and sewage of said Sanitary District of Chicago will be daily carried through said artificial channel and sent through the Des Plaines and Illinois rivers into the Mississippi, and great quantities thereof will be deposited in the bed and soil of said river belonging to your orator and wholly within the jurisdiction thereof, to your orator's great and irreparable damage, and that the 1,500 tons of undefecated sewage and filth now about to be daily injected into the waters of the Mississippi river and into the portion thereof over which the state of Missouri has jurisdiction, and from which thousands of her inhabitants obtain drinking water, will pollute and poison the said water of the Mississippi river to such an extent as to render it unwholesome and unfit and unhealthful for use for drinking by the said inhabitants in the territory of your orator, and unfit for use for watering stock and for manufacturing purposes.

"And your orator further shows that great quantities of undefecated sewage turned into the Mississippi river in the manner and by the means aforesaid will poison and pollute said water with the germs of disease of various and many kinds. And your orator further shows that the acts herein complained of on the part of the state of Illinois, acting in conjunction with one of her governmental agencies, the said Sanitary District of Chicago, will cause a continuing nuisance in the Mississippi river, and that the said state of Illinois has no power or authority to cause, or permit or assist in causing, the commission and continuance of a nuisance in the flowing waters of the Mississippi river, a navigable stream, to the detriment and irreparable and continuing damage and injury of the state of Missouri, and the continuing and irreparable injury to the lives and health of the citizens and inhabitants of the state of Missouri, and that unless restrained by the order and decree of this court the defendants, the state of Illinois and the Sanitary District of Chicago, acting together, will, in accordance with the terms of the act under which said sanitary district is organized, upon the permit and authority of the governor of Illinois and of the state of Illinois, turn said water and sewage aforesaid, by the manner and means aforesaid, into

the Des Plaines and Illinois rivers and thence into the Mississippi; all of which your orator says and avers is contrary to equity and good conscience, and would result in the manifest and irreparable injury of your orator and the health of her citizens in the premises; and your orator is wholly without remedy at law and without any adequate remedy to prevent the flowing of said sewage, as aforesaid, save by the interposition of this court.

"Forasmuch as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendants may, if they can, show why your orator should not have the relief prayed, and to the end that the defendants may make a full, true, direct, and perfect answer to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived, and to the end that the defendants, their officers, agents, servants, and employees may be restrained by injunction issuing out of this court from receiving or permitting any sewage to be received or discharged into said artificial channel or drain, and from permitting the same to flow or causing the same to be made to flow through said channel or drain towards and into the Des Plaines river, your orator prays that your honors may grant a writ of injunction, under the seal of this honorable court, properly restraining and enjoining the defendants, the officers, agents, employees, and servants of the Sanitary District of Chicago and the state of Illinois, from permitting or causing any of said sewage to be discharged into said channel or drain, and from permitting or causing said sewage and poisonous filth thence to flow into said Des Plaines river; that defendant, the state of Illinois, be enjoined and restrained from issuing to its codefendant permission and authority to do and perform the acts aforesaid or to allow them to be done; and your orator also prays for a provisional or temporary injunction pending this cause, restraining and enjoining the several acts aforesaid, and for such other and further relief as the equity of the case may require and to your honors may seem meet.

"May it please your honors to grant unto your orator, not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States of America, directed to the state of Illinois, the governor and attorney general thereof, and to said Sanitary District of Chicago, its officers, trustees, and agents, commanding them on a day certain to appear and answer unto this bill or complaint, and to abide such order and decree of the court in the premises as to the court shall seem proper and required by the principles of equity and good conscience."

In March, 1900, came the defendants and filed a demurrer to the bill of complaint, in the following terms:

"Now come the state of Illinois by its attorney general, Edwin C. Akin, and the Sanitary District of Chicago by its

attorneys, and demur to the bill of complaint filed herein, and say that the said bill of complaint and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said state of Missouri to have and maintain its aforesaid action against the said state of Illinois and the Sanitary District of Chicago, and that said defendants are not bound by the law of the land to answer the same; and the said defendants, according to the form of the statute in such case made and provided, state and show to the court here the following causes of demurrer to the said bill of complaint:

"First. That this court has no jurisdiction of either the parties to or of the subject-matter of this suit, because it appears upon the face of said bill of complaint that the matters complained of, as set forth therein, do not constitute, within the meaning of the Constitution of the United States, any controversy between the state of Missouri and the state of Illinois, or any of its citizens.

"Second. That the matters alleged and set forth in said bill of complaint show that the only issues presented therein arise, if at all, between the state of Illinois and a public corporation created under the laws of said state, and certain cities and towns in their corporate capacity as such, in the state of Missouri, and certain persons in said state of Missouri, residing on or near the banks of the Mississippi river, and which matters so stated in said bill of complaint, if true, do not concern the state of Missouri as a corporate body or state.

"Third. That said bill of complaint shows upon its face that this suit is in fact for and on behalf of certain cities and towns in said state of Missouri, situate on the banks of the Mississippi river, and certain persons who reside in said state on or near the banks of said river; and that, although the said suit is attempted to be prosecuted for and in the name of the state of Missouri, said state is, in effect loaning its name to said cities and towns and to said individuals, and is only a nominal party to said suit, and that the real parties in interest are the said cities and towns in their corporate capacity as such, and said private persons or citizens of said state.

"Fourth. That it appears upon the face of said bill of complaint that the said state of Missouri, in her right of sovereignty, is seeking to maintain this suit for the redress of the supposed wrongs of certain cities and towns in said state, in their corporate capacity as such, and of certain private citizens of said state, while under the Constitution of the United States and the laws enacted thereunder the said state possesses no such sovereignty as empowers it to bring an original suit in this court for such purpose.

"Fifth. That it appears upon the face of said bill of complaint that no property rights of the state of Missouri are in any manner affected by the matters alleged in said bill of complaint; nor is there any such property right involved in

this suit as would give this court original jurisdiction of this cause.

"Sixth. That in order to authorize this court to maintain original jurisdiction of this suit as against the state of Illinois, or against any citizens of said state, it must appear that the controversy set forth in the bill of complaint and to be determined by this court is a controversy arising directly between the state of Missouri and the state of Illinois, or some of its citizens, and not a controversy in vindication of the alleged grievances of certain cities and towns in said state or of particular individuals residing therein.

"Seventh. The said bill of complaint is in other respects uncertain, informal, and insufficient, and that it does not state facts sufficient to entitle the said state of Missouri to the equitable relief prayed for in said bill of complaint.

"Wherefore, for want of a sufficient bill of complaint in this behalf, the said defendants pray judgment, and that the said state of Missouri may be barred from having or maintaining the aforesaid action against said defendants, and that this court will not take further cognizance of this cause, and that the said defendants be hence dismissed with their costs."

On November 12, 1900, the case came on to be heard on bill and demurrer, and was argued by counsel.

Messrs. B. Schnurmacher and E. C. Crow for complainant.

Messrs. Charles C. Gilbert, Wm. M. Springer, E. C. Akin, and Samuel M. Burdett for defendants.

Mr. Justice Shiras delivered the opinion of the court:

This cause is now before us on the bill of complaint and the demurrer thereto.

The questions thus presented are two: First, whether the allegations of the bill disclose the case of a controversy between the state of Missouri and the state of Illinois and a citizen thereof, within the meaning of the Constitution and statutes of the United States, which create and define the original jurisdiction of this court; and, second, whether, if it be held that the allegations of the bill do present such a controversy, they are sufficient to entitle the state of Missouri to the equitable relief prayed for.

Controversy between States—City as Agent of State—Jurisdiction of Supreme Court.

The question whether the acts of one state in seeking to promote the health and prosperity of its inhabitants by a system of public works, which endangers the health and prosperity of the inhabitants of another and adjacent state, would create a sufficient basis for a controversy, in the sense of the Constitution, would be readily answered in the affirmative if regard were to be had only to the language of that instrument.

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. . . .

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, . . . to controversies between two or more states, between a state and citizens of another state. . . . In all cases, . . . in which a state shall be party, the Supreme Court shall have original jurisdiction." Const. art. 3.

As there is no definition or description, contained in the Constitution, of the kind and nature of the controversies that should or might arise under these provisions, it might be supposed that, in all cases wherein one state should institute legal proceedings against another, the original jurisdiction of this court would attach.

But in this, as in other instances, when called upon to construe and apply a provision of the Constitution of the United States, we must look, not merely to its language, but to its historical origin, and to those decisions of this court in which its meaning and the scope of its operation have received deliberate consideration.

After the Declaration of Independence the united colonies, through delegates appointed by each of the colonies, considered articles of confederation, which were debated from day to day, and from time to time, for two years, and were on July 9, 1778, ratified by ten states; by New Jersey on November 26 of the same year; by Delaware on the 23d of February, 1779, and by Maryland on March 1, 1781.

The 1st article was as follows: "The style of this confederacy shall be 'The United States of America.'"

The 9th article contained, among other provisions, the following:

"The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise, between two or more states, concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislative or executive authority, or lawful agent, of any state, in controversy with another, shall present a petition of Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other state in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot; and the per-

sons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each state, and the secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court, to be appointed in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall in like manner be final and decisive, the judgment or sentence, and other proceedings, being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned; provided, that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the supreme or superior court of the state where the cause shall be tried, 'well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward; provided, also, that no state shall be deprived of territory for the benefit of the United States.'"

It will therefore be perceived that under the confederation the necessity of a tribunal to hear and determine matters in question between two or more states was recognized; that a court was provided for that purpose; and that the scope or field within which it was expected such matters in question or controversies should or might arise for the determination of such court extended to "all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction, or any other cause whatever."

When the Federal convention met in 1787 to form the present Constitution of the United States, several drafts of such an instrument were presented for the consideration of the convention. One of these was offered on May 29 by Edmund Randolph, of Virginia, in the shape of resolutions covering the entire subject of a national government. The 9th resolution prescribed the formation of a national judiciary, to consist of supreme and inferior tribunals, with jurisdiction to hear and determine, among other things, "questions which involve the internal peace or harmony." 1 Elliot, Debates, p. 143. On the same day Charles Pinckney, of South Carolina, submitted a draft of a Federal government, the 7th article whereof was as follows:

"The Senate shall have the sole and exclusive power to declare war and to make treaties, and to appoint ambassadors

and other ministers to foreign nations, and judges of the Supreme Court."

"They shall have the exclusive power to regulate the manner of deciding all disputes and controversies now subsisting, or which may arise, between the states respecting jurisdiction or territory." 1 Elliot, Debates, p. 145.

On June 19 the committee of the whole, to which had been referred the several propositions and drafts, reported to the convention for its consideration a draft as altered, amended, and agreed to in the committee. The 13th resolution was as follows:

"That the jurisdiction of the national judiciary shall extend to cases which respect the collection of the national revenue, impeachment of any national officers, and questions which involve the national peace and harmony." 1 Elliot, Debates, p. 182.

On August 6 a committee of five members, to which the various propositions, as originally made and as amended in the committee of the whole, reported to the convention a draft of the Constitution, the 9th article of which was as follows:

"Sec. 1. The Senate of the United States shall have power to make treaties and appoint ambassadors and judges of the Supreme Court.

"Sec. 2. In all disputes and controversies now subsisting, or that may hereafter subsist, between two or more states, respecting jurisdiction or territory, the Senate shall possess the following powers, etc. [And here follows a scheme for a special court, in terms similar to that provided in the articles of confederation.]

"Sec. 3. All controversies concerning lands claimed under different grants of two or more states, whose jurisdiction, as they respect such lands, shall have been decided or adjusted subsequent to such grants, or any of them, shall, on application to the Senate, be finally determined, as near as may be, in the same manner as is before prescribed for deciding controversies between different states."

The 11th article contained, among other sections, the following:

"Sec. 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as shall, when necessary, from time to time, be constituted by the legislature of the United States. . . .

"Sec. 3. The jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the legislature of the United States; to all cases affecting ambassadors, other public ministers, and consuls; to the trial of impeachment of officers of the United States; to all cases of admiralty and maritime jurisdiction; to controversies between two or more states, except such as shall regard territory or jurisdiction; between a state and citizens of another state; between citizens of different states; and between a state or the citizens thereof

and foreign states, citizens, or subjects." 1 Elliot, Debates, p. 224.

It may be observed, in passing, that, in this draft, all disputes and controversies between two or more states respecting jurisdiction or territory are to be determined by a special court to be constituted by the Senate; and controversies between two or more states, except such as shall regard territory or jurisdiction, are determinable by the Supreme Court. It is therefore apparent that other disputes or controversies between states were regarded and provided for besides those respecting territory or jurisdiction.

This draft, together with numerous suggestions and amendments, was on August 7 submitted to the committee of the whole.

On September 12 a committee on revision reported a draft of the Constitution as revised and arranged. This draft, which, as respects our present subject, was in the terms of the Constitution as finally adopted, took from the Senate the power to constitute a court to try disputes between the states respecting territory or jurisdiction, and struck out the provision excluding from the jurisdiction of the Supreme Court disputes between the states in matters respecting jurisdiction and territory. The entire jurisdiction of controversies between states was bestowed upon the Supreme Court, in the 2d section of article 3, in the following terms:

The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state, claiming lands under grants of different states; and between a state or the citizens thereof, and foreign states, citizens, or subjects.

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

As in this section power is conferred on Congress to make regulations affecting the exercise by the Supreme Court of its jurisdiction, it may not be out of place to quote the provisions in this respect of the judiciary act of 1789:

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state, and its citizens, or between a state and citizens of other states or aliens, in which latter cases it shall

have original, but not exclusive, jurisdiction." Rev. Stat. § 687.

The case of New York v. Connecticut, 4 Dall. 3, 1 L. Ed. 715, in 1799, was the first instance of an exercise by the Supreme Court of its jurisdiction in a controversy between two states. It was a case of a bill in equity filed by the state of New York against the state of Connecticut and certain private persons who were grantees of the latter state of lands, the jurisdiction over which was claimed by both states. The object of the bill was to obtain an injunction to stay proceedings in ejectment pending in the circuit court of the United States for the district of Connecticut.

The court was of opinion that, as the state of New York was not a party to the suits below, nor interested in the decisions of those suits, an injunction ought not to issue. No argument was made that the court had not jurisdiction, and the court proceeded on the assumption that it possessed jurisdiction, although, under the facts of the case, it refused the injunction prayed for.

New Jersey v. New York, 5 Pet. 285, 8 L. Ed. 127, was the case of a bill filed by the state of New Jersey against the state of New York for the purpose of ascertaining and settling the boundary between the two states. In an opinion awarding the process of subpœna Chief Justice Marshall said:

"The Constitution of the United States declares that 'the judicial power shall extend to controversies between two or more states.' It also declares that 'in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction.' . . . It has then been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a state, under the authority conferred by the Constitution and existing acts of Congress."

In March, 1832, the state of Rhode Island filed in this court a bill against the state of Massachusetts, for the settlement of the boundary between the two states, and moved for a subpœna to be issued, according to the practice of the court in similar cases. An appearance was entered for Massachusetts, and a motion was made to dismiss the bill for want of jurisdiction. In support of the motion it was contended that this court had no jurisdiction because of the character of the respondent independent of the nature of the suit, and because of the nature of the suit independent of the character of the respondent. It was not denied that Massachusetts had agreed, by adopting the Federal Constitution, to submit her controversies with other states to judicial decision, but it was claimed that Congress had passed no law establishing a mode of proceeding, the character of the judgment to be rendered, and means of enforcing it. As respects the nature of the suit, it was argued that it was in its character political, brought by a sovereign,

in that avowed character; that the judicial power of the United States extended, by the Constitution, only to cases of law and equity, and that questions of jurisdiction over territory were not cases of that kind, nor of "a civil nature."

The court held that jurisdiction as conferred by the Constitution and the judiciary act, and that, as Massachusetts had appeared, submitted to the process, and pleaded in bar of the plaintiff's action certain matters on which the judgment of the court was asked, all doubts as to jurisdiction over the parties were at rest.

As respected the power of the court to hear and determine the subject-matters of the suit, it was held that jurisdiction existed; that the dispute was a controversy between two states within the judicial power of the United States. 12 Pet. 657, 9 L. Ed. 1233; 13 Pet. 23, 10 L. Ed. 41.

Before leaving this case it is to be remarked that the principal contest was as to whether a question of boundary, involving as it did the question of sovereignty over territory, was a judicial question of a civil nature. The implication was that the controversies between two or more states, in which jurisdiction had been granted by the Constitution, did not include questions of a political character. In some of the later cases the contention has been the very opposite; that the intention of the Constitution was only to apply to questions in which the sovereign and political powers of the respective states were in controversy.

In Florida v. Georgia, 11 How. 293, 13 L. Ed. 702, leave was given by this court to the state of Florida to file a bill against the state of Georgia, and process of subpœna was directed to be issued against the state of Georgia. The object of the bill was to ascertain and establish the boundary between the two states, which was in controversy. The state of Georgia answered, and the cause was proceeded in, in pursuance of the prayers of the bill. Subsequently an application was made by the Attorney General of the United States, alleging that the latter were interested and concerned in the matter in controversy, and moving the court that he be permitted to appear in the case, and be heard in behalf of the United States, in such time and form as the court should order. This motion was opposed by the states, and the matter was argued at length. The judges differed, but neither in the opinion of the majority, granting the motion of the Attorney General, nor in that of the dissenting minority, was any doubt expressed of the existence of the jurisdiction of the court over the controversy between the two states.

Pennsylvania v. Wheeling & B. Bridge Co., 9 How. 647, 13 L. Ed. 294; Idem v. Idem, 11 How. 528, 13 L. Ed. 799; Idem v. Idem, 13 How. 518, 14 L. Ed. 249; Idem v. Idem, 18 How. 429, 15 L. Ed. 436, was a case in equity, in which the state of Pennsylvania filed a bill against the Wheeling & Belmont Bridge Company, a corporation of Virginia, and certain con-

tractors, charging that the defendants, under color of an act of the legislature of Virginia, were engaged in the construction of a bridge across the Ohio river at Wheeling, which would, as was alleged, obstruct its navigation to and from the ports of Pennsylvania, by steamboats and other crafts which navigated the same. Many different questions were discussed by counsel and considered by the court, respecting the nature and extent of the jurisdiction of this court, the right of the complainant state, whether at law or in equity, and the character of the decree which could be rendered. Several observations made in the opinion of the court will be hereafter adverted to when we come to consider the second ground of demurrer urged in the case before us. It is sufficient for our present purpose to say that the original jurisdiction of the court was sustained, a commissioner was appointed to take and report proofs, and a decree was entered declaring the bridge to be an obstruction of the free navigation of the river, that thereby a special damage was occasioned to the plaintiff, for which there was not an adequate remedy at law, and directing that the obstruction be removed, either by elevating the bridge to a height designated, or by abatement.

South Carolina v. Georgia, 93 U. S. 4, 23 L. Ed. 782, was a suit in equity brought in this court, whereby the state of South Carolina sought an injunction to restrain the state of Georgia, the United States Secretary of War, the Chief Engineer of the United States Army, their agents and subordinates, from obstructing the navigation of the Savannah river, in violation of an alleged compact subsisting between the states of South Carolina and Georgia, and which had been entered into on April 24, 1787. This court, not denying, but assuming, jurisdiction in the case, held that, by adopting the Federal Constitution, and thereby delegating to the general government the right to regulate commerce with foreign nations and among the several states, the compact between the two states in respect to the Savannah river ceased to operate, and that the acts complained of, being done in pursuance of congressional authority, and designed to improve navigation, could not be deemed an illegal obstruction, and accordingly the special injunction previously granted was dissolved and the bill dismissed.

Wisconsin v. Duluth, 96 U. S. 381, 24 L. Ed. 669, was the case of a bill in chancery filed in this court by the state of Wisconsin, by virtue of the constitutional provision which confers original jurisdiction of suits between the states and between a state and citizens of other states. The city of Duluth, a corporation and citizen of the state of Minnesota, was defendant; and, after answer, replication, and the taking of a large amount of evidence, the case came on for a final decree. The nature of the case and the reasoning upon which this court proceeded in disposing of it will sufficiently appear in the fol-

lowing quotations from the opinion delivered by Mr. Justice Miller:

"The present suit was brought by the state of Wisconsin on the ground that the channel of the St. Louis river, as it flowed in a state of nature, was the common boundary between that state and the state of Minnesota, and that she has an interest in the continuance of the channel as an important highway for navigation and commerce in its natural and usual course; that the canal cut by Duluth across Minnesota point, deeper than the natural outlet of the St. Louis river at its mouth, has diverted, and will continue to divert, the current of that river through Superior bay into the lake by way of that canal; that the result of this is that, while the current cuts that canal deeper and gives an outlet for the water there at a lower level, it at the same time, by diverting this current from the old outlet, causes it to fill up, and thus destroys the usefulness of the river and bay as an aid of commerce on which the state had a right to rely. The bill, after reciting the facts which we have already detailed, insists that the city of Duluth cannot, by any right of her own, nor by any authority conferred on her by the state of Minnesota, thus divert the waters of the stream—the St. Louis river—from their natural course, to the prejudice of the rights of the state of Wisconsin or of her citizens; declares that this canal at Duluth does this in violation of law; and it prays of this court to enjoin Duluth from protecting or maintaining it, and by way of mandatory injunction to compel that city to fill up the canal and restore things in that regard to the condition of nature in which they were before the canal was made.

"The answer, while admitting the construction of the canal, denies almost every other material allegation of the bill. It denies especially that the canal has the effect of changing the course of the current of the river, or does any injury to the southern entrance to Superior bay, or diminishes the flow of water at that point. A large amount of testimony, professional and nonprofessional, is presented on that subject.

"The answer also sets up, as an affirmative defense to the relief sought by the bill, that the United States, by the legislative and executive departments of the government, have approved of the construction of the canal, have taken possession and control of the work, have appropriated and spent money on it, and adopted it as the best mode of making a safe and accessible harbor at the western end of the great system of lake navigation.

"Many interesting questions have been argued, and ably argued, by counsel, which we have not found it necessary to decide. The counsel for defense deny that the state of Wisconsin has any such legal interest in the flow of the waters in their natural course as authorizes her to maintain a suit for their diversion. It is argued that this court can take cognizance of no question which concerns alone the rights of a state

in her political or sovereign character; that to sustain this suit she must have some proprietary interest which is affected by the defendant. This question has been raised and discussed in almost every case brought before us by a state, in virtue of the original jurisdiction of the court. We do not find it necessary to make any decision on the point as applicable to the case before us. Nor shall we address ourselves to the consideration of the mass of conflicting evidence as to the effect of the canal on the flow of the waters of Superior bay.

"We will first consider the affirmative defense already mentioned; for, if that be found to be true in point of fact, it will preclude any such action by this court as the plaintiff has prayed for."

The court then proceeded to inquire into the action of the general government in the matter of the canal in question, and found that, as matter of fact, the United States had taken possession and control of the canal as a public work. The opinion concluded as follows:

"If, then, Congress, in the exercise of a lawful authority, has adopted and is carrying out a system of harbor improvements at Duluth, this court can have no lawful authority to forbid the work. If that body sees fit to provide a way by which the great commerce of the lakes and the countries west of them, even to Asia, shall be securely accommodated at the harbor of Duluth by this short canal of 300 or 400 feet, can this court decree that it must forever pursue the old channel, by the natural outlet, over water too shallow for large vessels, unsafe for small ones, and by a longer and much more tedious route?

"When Congress appropriates $10,000 to improve, protect, and secure this canal, this court can have no power to require it to be filled up and obstructed. While the engineering officers of the government are, under the authority of Congress, doing all they can to make this canal useful to commerce and to keep it in good condition, this court can owe no duty to a state which requires it to order the city of Duluth to destroy it.

"These views show conclusively that the state of Wisconsin is not entitled to the relief asked by her bill, and that it must therefore be dismissed with costs."

The court therefore did not decline jurisdiction, but exercised it by inquiring into the facts put in issue by the bill and answer, and by dismissing the bill for want of equity.

In Virginia v. West Virginia, 11 Wall. 39, 20 L. Ed. 67, a bill was filed in this court to settle the boundaries between the two states. There was a demurrer to the bill. In delivering the opinion of the court Mr. Justice Miller said:

"The first proposition on which counsel insist in support of the demurrer is that this court has no jurisdiction of the case, because it involves the consideration of questions purely political; that is to say, that the main question to be decided is the conflicting claims of the two states to the exercise of

political jurisdiction and sovereignty over the territory and inhabitants of the two counties which are the subject of dispute. This proposition cannot be sustained without reversing the settled course of decision in this court, and overturning the principles on which several well-considered cases have been decided."

And, after citing Rhode Island v. Massachusetts, 12 Pet. 724, 9 L. Ed. 1260; Missouri v. Iowa, 7 How. 660, 12 L. Ed. 861; Florida v. Georgia, 17 How. 478, 15 L. Ed. 181; and Alabama v. Georgia, 23 How. 505, 16 L. Ed. 556, the conclusion of the court was thus expressed:

"We consider, therefore, the established doctrine of this court to be that it has jurisdiction of questions of boundary between two states of this Union, and that this jurisdiction is not defeated because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those states, or because the decree which the court may render affects the territorial limits of the political jurisdiction and sovereignty of the states which are parties to the proceeding."

In New Hampshire v. Louisiana, and New York v. Louisiana, 108 U. S. 76, 27 L. Ed. 656, 2 Sup. Ct. Rep. 176, it was found that, in view of the 11th Amendment to the Constitution of the United States, declaring that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens and subjects of any foreign state," as matter of fact, under the pleadings and testimony, the suits were commenced and were prosecuted solely by the owners of the bonds and coupons to collect which was the object of the suits, and it was accordingly held that "the evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a state by or for citizens of other states or aliens, without the consent of the state to be sued, and, in our opinion, one state cannot create a controversy with another state, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other state to its citizens. Such being the case, we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and the bill in each case is dismissed."

In Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. Ed. 239, 8 Sup. Ct. Rep. 1370, the nature of the case and of the question involved was thus said by Mr. Justice Gray, in delivering the opinion of the court:

"This action is brought upon a judgment recovered by the state of Wisconsin in one of her own courts against the Pelican Insurance Company, a Louisiana corporation, for penalties imposed by a statute of Wisconsin for not making returns to the insurance commissioner of the state, as required by that

statute. The leading question argued at the bar is whether such an action is within the original jurisdiction of this court.

"The ground on which the jurisdiction is invoked is not the nature of the cause, but the character of the parties, the plaintiff being one of the states of the Union, and the defendant a corporation of another of those states."

After citing and considering the cases, the justice expressed the following conclusions:

"The rule that the courts of no country execute the penal laws of another applies, not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties. . . . From the first organization of the courts of the United States, nearly a century ago, it has always been assumed that the original jurisdiction of this court over controversies between a state and citizens of another state or of a foreign country does not extend to a suit by a state to recover penalties for a breach of her own municipal law. . . . The statute of Wisconsin, under which the state recovered in one of her own courts the judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another state doing business in the state of Wisconsin without having deposited with the proper officer of the state a full statement of its property and business during the previous year. . . . The cause of action was not any private injury, but solely the offense committed against the state by violating her law. . . . This court, therefore, cannot entertain an original action to compel the defendant to pay to the state of Wisconsin a sum of money in satisfaction of the judgment for that fine."

And consequently judgment was entered for the defendant on the demurrer that had been interposed to the declaration.

Hans v. Louisiana, 134 U. S. 1, 33 L. Ed. 842, 10 Sup. Ct. Rep. 504, was an action brought in the circuit court of the United States for the eastern district of Louisiana, against the state of Louisiana, by Hans, a citizen of that state, to recover the amount of certain coupons annexed to bonds of the state. The circuit court, on motion of the attorney general of the state, dismissed the case for want of jurisdiction. This court affirmed the judgment of the circuit court, and held that the judicial power of the United States did not extend to the case of a suit brought against a state by one of its own citizens.

In the course of the opinion, delivered by Mr. Justice Bradley, the following observations were made:

"The truth is that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common

law; such, for example, as controversies between states as to boundary lines, and other questions admitting of judicial solution. And yet the case of Penn v. Baltimore, 1 Ves. Sr. 444, shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times; and several cases of the same general character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose in those articles. 131 U. S. l. appx. The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the states. Of other controversies between a state and another state, or its citizens, which, on the settled principles of public law, are not subjects of judicial cognizance, this court has often declined to take jurisdiction. See Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 288, 289, 32 L. Ed. 239, 243, 8 Sup. Ct. Rep. 1370, and cases there cited."

The last case which we have had occasion to examine is that of Louisiana v. Texas, 176 U. S. 1, 15, 44 L. Ed. 347, 353, 20 Sup. Ct. Rep. 251, 256. The case was brought before us by a bill in equity filed by the state of Louisiana against the state of Texas, her governor, and her health officer. The bill alleged that the state of Texas had granted to its governor and its health officer extensive powers over the establishment and maintenance of quarantines over infectious and contagious diseases; that this power had been exercised in a way and with a purpose to build up and benefit the commerce of cities in Texas, which were business rivals of the city of New Orleans, and prayed for a decree that neither the state of Texas, nor her governor, nor her health officer, has the right, under the cover of an exercise of police or quarantine powers, to declare and enforce an embargo against interstate commerce between the state of Louisiana, or any part thereof, and the state of Texas, or the right to make discriminative rules affecting the state of Louisiana, or any part thereof, and different from and more burdensome than the quarantine rules and regulations applied to other states and countries; and the bill asked for an injunction restraining the Texas officials from enforcing the Texas laws in the manner in which they were enforced. To this bill a demurrer was filed, assigning the following causes:

"First. That this court has no jurisdiction of either the parties to or of the subject-matter of this suit, because it appears from the face of said bill that the matters complained of do not constitute, within the meaning of the Constitution of the United States, any controversy between the states of Louisiana and Texas. Second. Because the allegations of said bill shows that the only issues presented by said bill arise between the state of Texas or her officers, and certain persons in the city of New Orleans, in the state of Louisiana, who are engaged in interstate commerce, and which do not in any manner concern the state of Louisiana as a corporate body or state.

Third. Because said bill shows upon its face that this suit is in reality for and on behalf of certain individuals engaged in interstate commerce, and while the suit is attempted to be prosecuted for and in the name of the state of Louisiana, said state is in effect loaning its name to said individuals and is only a nominal party, the real parties at interest being said individuals in the said city of New Orleans who are engaged in interstate commerce. Fourth. Because it appears from the face of said bill that the state of Louisiana in her right of sovereignty is seeking to maintain this suit for the redress of the supposed wrongs of her citizens in regard to interstate commerce, while under the Constitution and laws the said state possesses no such sovereignty as empowers her to bring an original suit in this court for such purpose. Fifth. Because it appears from the face of said bill that no property right of the state of Louisiana is in any manner affected by the quarantine complained of, nor is any such property right involved in this suit as would give this court original jurisdiction of this cause."

In the opinion of the court, delivered by Mr. Chief Justice Fuller, after a consideration of the cases hereinbefore mentioned and of others, it was said:

"In order, then, to maintain jurisdiction of this bill of complaint, as against the state of Texas, it must appear that the controversy to be determined is a controversy arising directly between the state of Louisiana and the state of Texas, and not a controversy in the vindication of the grievances of particular individuals.

"By the Constitution the states are forbidden to 'enter into any treaty, alliance, or confederation; grant letters of marqué and reprisal,' or without the consent of Congress 'keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay.' . . .

"Controversies between them arising out of public relations and intercourse cannot be settled either by war or diplomacy, though, with the consent of Congress, they may be composed by agreement. . . .

"In the absence of agreement it may be that a controversy might arise between two states for the determination of which the original jurisdiction of this court would be invoked, but there must be a direct issue between them, and the subject-matter must be susceptible of judicial solution. And it is difficult to conceive of a direct issue between two states in respect of a matter where no effort at accommodation has been made; nor can it be conceded that it is within the judicial function to inquire into the motives of a state legislature in passing a law, or of the chief magistrate of a state in enforcing it in the exercise of his discretion and judgment. Public policy forbids the imputation to authorized official action of any other than legitimate motives. . . .

"But in Re Debs, 158 U. S. 564, 39 L. Ed. 1092, 15 Sup. Ct. Rep. 900, involving a case in the circuit court, in which the United States had sought relief by injunction, it was observed: "That while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts or prevent it from taking measures therein to fully discharge those constitutional duties.'

"It is in this aspect that the bill before us is framed. Its gravamen is not a special and peculiar injury such as would sustain an action by a private person, but the state of Louisiana presents herself in the attitude of parens patriæ, trustee, guardian, or representative of all her citizens. She does this from the point of view that the state of Texas is intentionally absolutely interdicting interstate commerce as respects the state of Louisiana by means of unnecessary and unreasonable quarantine regulations. Inasmuch as the vindication of the freedom of interstate commerce is not committed to the state of Louisiana, and that state is not engaged in such commerce, the cause of action must be regarded, not as involving any infringement of the powers of the state of Louisiana, or any special injury to her property, but as asserting that the state is entitled to seek relief in this way because the matters complained of affect her citizens at large. Nevertheless if the case stated is not one presenting a controversy between these states, the exercise of original jurisdiction by this court as against the state of Texas cannot be maintained."

After quoting the provisions of the statute of the state of Texas regulating the subject of quarantine, the Chief Justice proceeded to say:

"It is not charged that this statute is invalid, nor could it be if tested by its terms. While it is true that the power vested in Congress to regulate commerce among the states is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution, and that where the action of the states in the exercise of their reserved powers comes into collision with it the latter must give way, yet it is also true that quarantine laws belong to that class of state legislation which is valid until displaced by Congress, and that such legislation has been expressly recognized by the laws of the United States almost from the beginning of the government. . . . The complaint here, however, is not that the laws of Texas in respect of quarantine are invalid, but that the health officer, by rules and regulations framed and put in

force by him thereunder, places an embargo in fact on all interstate commerce between the state of Louisiana and the state of Texas, and that the governor permits these rules and regulations to stand and be enforced, although he has the power to modify or change them. The bill is not rested merely on the ground of the imposition of an embargo without regard to motive, but charges that the rules and regulations are more stringent than called for by the particular exigency, and are purposely framed with the view to benefit the state of Texas, and the city of Galveston in particular, at the expense of the state of Louisiana, and especially of the city of New Orleans.

"But in order that a controversy between states, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one state are injured by the maladministration of the laws of another. The states cannot make war, or enter into treaties, though they may, with the consent of Congress, make compacts and agreements. Where there is no agreement whose breach might create it, a controversy between states does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one state to a distinct collision with a sister state.

"In our judgment, this bill does not set up facts which show that the state of Texas has so authorized or confirmed the alleged action of her health officer as to make it her own, or from which it necessarily follows that the two states are in controversy within the meaning of the Constitution.

"Finally, we are unable to hold that the bill may be maintained as presenting a case of controversy 'between a state and citizens of another state.' Jurisdiction over controversies of that sort does not embrace the determination of political questions, and, where no controversy exists between states, it is not for this court to restrain the governor of a state in the discharge of his executive functions in a matter lawfully confided to his discretion and judgment. Nor can we accept the suggestion that the bill can be maintained as against the health officer alone on the theory that his conduct is in violation or in excess of a valid law of the state, as the remedy for that would clearly lie with the state authorities, and no refusal to fulfil their duty in that regard is set up. In truth it is difficult to see how on this record there could be a controversy between the state of Louisiana and the individual defendants without involving a controversy between the states, and such a controversy, as we have said, is not presented."

Accordingly the demurrer was sustained and bill dismissed.

From the language of the Constitution, and from the cases in which that language has been considered, what principles may be derived as to the nature and extent of the original jurisdiction of this court in controversies between two or more states?

From the language, alone considered, it might be concluded that whenever and in all cases where one state may choose to make complaint against another, no matter whether the subject of complaint arises from the legislation of the defendant state, or from acts of its officers and agents, and no matter whether the nature of the injury complained of is to affect the property rights or the sovereign powers of the complaining state, or to affect the rights of its citizens, the jurisdiction of this court would attach.

Chief Justice Marshall in the case of Cohen v. Virginia, 6 Wheat. 364, 392, 5 L. Ed. 281, 288, said:

"The Constitution gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others. Among those in which jurisdiction must be exercised in the appellate form are cases arising under the Constitution and laws of the United States. These provisions of the Constitution are equally obligatory, and are to be equally respected. If a state be a party, the jurisdiction of this court is original; if the case arise under a constitution or a law, the jurisdiction is appellate. But a case to which a state is a party may arise under the Constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the court? Certainly, we think, so to construe the Constitution as to give effect to both provisions as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument.

"In one description of cases the jurisdiction of the court is founded entirely on the character of the parties, and the nature of the controversy is not contemplated by the Constitution. The character of the parties is everything, the nature of the case nothing. In the other description of cases the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the Constitution. In these the nature of the case is everything, the character of the parties nothing. When, then, the Constitution declares the jurisdiction, in cases where a state shall be a party, to be original, and in all cases arising under the Constitution or a law to be appellate, the conclusion seems irresistible that its framers designed to include in the first class those cases in which jurisdiction is given because a state is a party; and to include in the second those in which jurisdiction is given because the case arises under the Constitution or a law."

But it must be conceded that upon further consideration, in cases arising under different states of facts, the general language used in Cohen v. Virginia has been, to some extent, modified. Thus, in the cases of New Hampshire v. Louisiana, and New York v. Louisiana, 108 U. S. 76, 27 L. Ed. 656, 2 Sup. Ct. Rep. 176, jurisdiction was denied to this court where the cause of action belonged to private persons who were

endeavoring to use the name of one state to enforce their rights of action against another; though, perhaps, it may be said that jurisdiction was really entertained, and that the bills were dismissed because the court found that, under the pleadings and testimony, the state complainant had no interest of any kind in the proceedings.

So, too, in Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. Ed. 239, 8 Sup. Ct. Rep. 1370, the court held that, notwithstanding the action was brought by a state against the citizens of another state, and was thus within the letter of the Constitution, yet that the court had a right to inquire into the nature of the case, and, when it found that the object of the suit was to enforce the penal laws of one state against a citizen of another, to refuse to exercise jurisdiction.

In the case of Louisiana v. Texas, 176 U. S. 1, 44 L. Ed. 347, 20 Sup. Ct. Rep. 251, the bill was dismissed because a controversy between the two states was not actually presented; that what was complained of was not any action of the state of Texas, but the alleged unauthorized conduct of its health officer, acting with a malevolent purpose against the city of New Orleans. Here again it may be observed that the court did not decline jurisdiction, but exercised it in holding that the facts alleged in the bill did not justify the court in granting the relief prayed for.

The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and the inhabitants, and in cases directly affecting the property rights and interests of a state. But such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy; and it would be objectionable, and, indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court.

An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the state of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant state. But it must surely be conceded that, if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them. If Missouri were an independent and sovereign state all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy, we think, is found in the constitutional provisions we are considering.

The allegations of the bill plainly present such a case. The health and comfort of the large communities inhabiting

those parts of the state situated on the Mississippi river are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the state. Moreover, substantial impairment of the health and prosperity of the towns and cities of the state situated on the Mississippi river, including its commercial metropolis, would injuriously affect the entire state.

That suits brought by individuals, each for personal injuries threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument.

It is further contended, in support of the demurrer, that even if the state of Missouri be the proper party to file such a bill, yet that the proper defendant is the Sanitary District of Chicago solely, and that the state of Illinois should not have been made a party, and that, as to her, the demurrer ought to be sustained.

It can scarcely be supposed, in view of the express provisions of the constitution and of the cited cases, that it is claimed that the state of Illinois is exempt from suit because she is a sovereign state which has not consented to be sued. The contention rather seems to be that, because the matters complained of in the bill proceed and will continue to proceed from the acts of the Sanitary District of Chicago, a corporaton of the state of Illinois, it therefore follows that the state, as such, is not interested in the question, and is improperly made a party.

We are unable to see the force of this suggestion. The bill does not allege that the sanitary district is acting without or in excess of lawful authority. The averment and the conceded facts are that the corporation is an agency of the state to do the very things which, according to the theory of the complainant's case, will result in the mischief to be apprehended. It is state action and its results that are complained of,—thus distinguishing this case from that of Louisiana v. Texas, where the acts sought to be restrained were alleged to be those of officers or functionaries proceeding in a wrongful and malevolent misapplication of the quarantine laws of Texas. The Sanitary District of Chicago is not a private corporation formed for purposes of private gain, but a public corporation whose existence and operations are wholly within the control of the state.

The object of the bill is to subject this public work to judicial supervision, upon the allegation that the method of its construction and maintenance will create a continuing nuisance dangerous to the health of a neighboring state and its inhabitants. Surely, in such a case, the state of Illinois would have a right to appear and traverse the allegations of the bill, and, having such a right, might properly be made a party defendant.

Drainage as Nuisance—Equitable Relief.

It is further contended that, even if this court has original jurisdiction of the subject-matter, and even if the respective states have been properly made parties, yet the case made out by the bill does not entitle the state of Missouri to the equitable relief prayed for.

This proposition is sought to be maintained by several considerations. In the first place, it is urged that the drawing, by artificial means, of the sewage of the city of Chicago into the Mississippi river may or may not become a nuisance to the inhabitants, cities, and towns of Missouri; that the injuries apprehended are merely eventual or contingent, and may, in fact, never be inflicted. Can it be gravely contended that there are no preventive remedies, by way of injunction or otherwise, against injuries not inflicted or experienced, but which would appear to be the natural result of acts of the defendant, which he admits or avows it to be his intention to commit?

The bill charges that the acts of the defendants, if not restrained, will result in the transportation, by artificial means and through an unnatural channel, of large quantities of undefecated sewage daily, and of accumulated deposits in the harbor of Chicago and in the bed of the Illinois river, which will poison the water supply of the inhabitants of Missouri, and injuriously affect that portion of the bed or soil of the Mississippi river which lies within its territory.

In such a state of facts, admitted by the demurrer to be true, we do not feel it necessary to enter at large into a discussion of this part of the defendants' contention, but think it sufficient to cite one or two authorities.

Atty. Gen. v. Jamaica Pond Aqueduct Corp. 133 Mass. 361, was a proceeding in equity in the supreme judicial court to enjoin the defendants from lowering the water in one of the public ponds of Massachusetts. It was claimed that the necessary effect of such lowering would be to impair the rights of the people in the use of the pond for fishing, boating, and other lawful purposes, and to create and expose upon the shores of the pond a large quantity of slime, mud, and offensive vegetation, detrimental to the public health. The defendants demurred, claiming that no case was stated which came within the equity jurisdiction of the court, and questioning the power of the attorney general, on behalf of the commonwealth, to maintain the proceedings. Speaking for the court the Chief Justice said:

"The cases are numerous in which it has been held that the attorney general may maintain an information in equity to restrain a corporation exercising the right of eminent domain under a power delegated to it by the legislature, from any abuse or perversion of the powers, which may create a public nuisance or injuriously affect or endanger the public interests,"—citing many cases, and proceeding:

"The information in this case alleges, not only that the defendant is doing acts which are ultra vires, and an abuse of

the power granted to it by the legislature, but also that the necessary effect of such acts will be to create a public nuisance. This brings the case within the established principle that the court has jurisdiction in equity to restrain and prevent nuisances. And when the nuisance is a public one an information by the attorney general is the appropriate remedy. . . . This information, therefore, can be sustained on the ground that the unlawful acts of the defendant will produce a nuisance by partially draining the pond and exposing its shores, thus endangering the public health."

And replying to the claim that resort to equity was unnecessary, the court further said:

"The defendant contends that the law furnishes a plain, adequate, and complete remedy for this nuisance by an indictment or by proceedings under the statutes for the abatement of the nuisance by the board of health. Neither of these remedies can be invoked until a part of the mischief is done, and they could not, in the nature of things, restore the pond, the land, and the underground currents to the same condition in which they are now. In other words, they could not remedy the whole mischief. The preventive force of a decree in equity, restraining the illegal acts before any mischief is done, gives clearly a more efficacious and complete remedy."

The nature of equitable remedy in the case of public nuisances was well described by Mr. Justice Harlan, speaking for the court in the case of Mugler v. Kansas, 123 U. S. 623, 673, 31 L. Ed. 205, 214, 8 Sup. Ct. Rep. 273, 303:

"The ground of this jurisdiction, in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy than can be had at law. They can, not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and by perpetual injunction protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subjects of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community."

In Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 36 L. Ed. 537, 12 Sup. Ct. Rep. 689, it was said by this court, through Mr. Justice Harlan, after citing English and American cases:

"Proceedings at law or by indictment can only reach past or present wrongs done by the appellant, and will not adequately protect the public interests in the future. What the public are entitled to have is security for all time against illegal interference with the control by the state of the digging, mining, and removing of phosphate rock and phosphatic deposits in the bed of Coosaw river."

It is finally contended that, if the bill was not prematurely

filed, then it was filed too late; that, by standing by for so long a period, the complainant was guilty of such laches that a court of equity will not grant relief.

The inconsistency between these contentions is manifest, and, on consideration, we are of opinion that the suggestion that the complainants' remedy has been lost by delay is not founded in fact or reason.

In Goldsmid v. Tunbridge Wells Improv. Comrs., L. R. 1 Eq. 161, answering a similar contention, it was said by Romilly, M. R.:

"If he [the plaintiff] comes to the court and complains very early, then the evidence is that 'it [the pollution] is not perceptible'—'it is wholly inappreciable'—and you get evidence after evidence for the defendants (the pollution being slight and perhaps only observable at some times and on some occasions), saying: 'You have no proof at all that there is any appreciable pollution, and you must wait until it becomes a nuisance.' Then he waits for five or six years, until it is obvious to everybody's sense that the pollution is considerable, and then they say, 'You have come too late, you have allowed this to go on for twenty years, and we have acquired an easement over your property, and the right of pouring the sewerage into it.' My opinion is that any person who has a watercourse flowing through his land, and sewage which is perceptible is brought into that watercourse, has a right to come here to stop it; and that when the pollution is increasing, and gradually increasing from time to time, by the additional quantity of sewage poured into it, the persons who allow the polluted matter to flow into the stream are not at liberty to claim any right or prescription against him.

"This is a matter of very great importance, and it has been suggested to me in argument as a matter that ought to be regarded that private interests must give way to public interests; that the court ought to regard what the advantage to the public is, and that some little sacrifice ought to be made by private individuals. I do not assent to that view of the law on the subject, and I apprehend that the observations which were quoted to me of Vice Chancellor Sir William Page Wood, in Atty. Gen. ex rel. Thames Conservators v. Kingston-on-Thames, 13 Week. Rep. 888, are perfectly accurate, and that private rights are not to be interfered with. But my firm conviction is that in this, as in all the great dispensations and operations of nature, the interests of individuals are not only compatible with but identical with the interests of the public; and although in this case I have only to consider an injury to a private individual,—the plaintiff on the present occasion,—yet I believe that the injury to the public may be extremely great by polluting a stream which flows for a considerable distance, the water of which cattle are in the habit of drinking, the exhalations from which persons who reside on the banks must necessarily inhale, and this at a time when

the attention of the public and the court is necessarily called to the fact that the most scientific men who have examined the subject are unable to say whether great diseases among cattle and contagious diseases affecting human beings, such as cholera, and typhus, and the like, may not in a great measure be communicated or aggravated by the absorption of particles of feculent matter into the system, which are either inappreciable or scarcely appreciable by the most minute chemical analysis. It is impossible in that state of things to say what amount of injury may be done by polluting even partially a stream which flows a considerable distance. . . . I am of opinion that Mr. Goldsmid was not bound to remain quiet until this stream had become such a nuisance that it was obvious to everybody near its banks; and the result is that . . . he is entitled to a decree for an injunction to restrain the defendants from causing or permitting the sewage and other offensive matters draining from the town of Tunbridge Wells to be discharged into the Calverly Brook, or stream, in such manner as injuriously to affect the water of the brook as it flows through the plaintiff's land."

This decree of the Master of the Rolls was subsequently affirmed on appeal. L. R. 1 Ch. 348.

Similar views prevailed in Chapman v. Rochester, 110 N. Y. 273, 1 L. R. A. 296, 18 N. E. 88, where a bill was filed to enjoin the defendant city from polluting, by the discharge of sewage by artificial means, a natural stream flowing through his lands.

In the opinion of the New York court of appeals, it was said by Danforth, J., after citing Goldsmid v. Tunbridge Wells Improv. Comrs.:

"In view of the principle upon which these and like decisions turn, the objections of the learned counsel for the defendant against the judgment appealed from are quite unimportant.

Acquiescence by State as Bar to Relief.

The filth of the city does not flow naturally to the lands of the plaintiff, as surface water finds its level, but is carried thither by artificial arrangements prepared by the city, and for which it is responsible. Nor is the plaintiff estopped by acquiescence in the proceedings of the city in devising and carrying out its system of sewage. The principle invoked by the appellant has no application. It does not appear that the plaintiff in any way encouraged the adoption of that system, or by any act or word induced the city authorities to so direct the sewers that the flow from them should reach his premises. There is no finding to that effect, and the record contains no evidence. In fine, the case comes within the general rule which gives to a person injured by the pollution of air or water, to the use of which, in its natural condition, he is entitled, an action against the party, whether it be a natural person or corporation who causes that pollution."

Cases cited by defendants' counsel, where injunctions were

refused to aid in the suppression of public nuisances, were cases where the act complained of was fully completed, and where the nuisance was not one resulting from conduct repeated from day to day. Most of them were cases of purpresture, and concerned permanent structures already existing when courts in equity were appealed to.

The bill in this case does not assail the drainage canal as an unlawful structure, nor aim to prevent its use as a waterway. What is sought is relief against the pouring of sewage and filth through it, by artificial arrangements, into the Mississippi river, to the detriment of the state of Missouri and her inhabitants, and the acts are not merely those that have been done, or which when done cease to operate, but acts contemplated as continually repeated from day to day. The relief prayed for is against, not merely the creation of a nuisance, but against its maintenance.

Our conclusion, therefore, is that the demurrers filed by the respective defendants cannot be sustained. We do not wish to be understood as holding that, in a case like the present one, where the injuries complained of grow out of the prosecution of a public work authorized by law, a court of equity ought to interpose by way of preliminary or interlocutory injunction, when it is denied by answer that there is any reasonable foundation for the charges contained in the bill. We are dealing with the case of a bill alleging, in explicit terms, that damage and irreparable injury will naturally and necessarily be occasioned by acts of the defendants, and where the defendants have chosen to have their rights disposed of, so far as the present hearing is concerned, upon the assertions of this bill.

We fully agree with the contention of defendants' counsel that it is settled that an injunction to restrain a nuisance will issue only in cases where the fact of nuisance is made out upon determinate and satisfactory evidence; that if the evidence be conflicting and the injury be doubtful, that conflict and doubt will be a ground for withholding an injunction; and that, where interposition by injunction is sought, to restrain that which it is apprehended will create a nuisance of which its complainant may complain the proofs must show such a state of facts as will manifest the danger to be real and immediate. But such observations are not relevant to the case as it is now before us.

The demurrers are overruled, and leave is given to the defendants to file answers to the bill.

Mr. Chief Justice Fuller, with whom concurred Mr. Justice Harlan and Mr. Justice White, dissenting:

Controversies between the states of this Union are made justiciable by the Constitution because other modes of determining them were surrendered; and before that jurisdiction which is intended to supply the place of the means usually resorted to by independent sovereignties to terminate their

differences can be invoked, it must appear that the states are in direct antagonism as states. Clearly this bill makes out no such state of case.

If, however, on the case presented, it was competent for Missouri to implead the state of Illinois the only ground on which it can be rested is to be found in the allegation that its governor was about to authorize the water to be turned into the drainage channel.

The sanitary district was created by an act of the general assembly of Illinois, and the only authority of the state having any control or supervision over the channel is that corporation. Any other control or supervision lies with the lawmaking power of the state of Illinois, and I cannot suppose that complainant seeks to coerce that. It is difficult to conceive what decree could be entered in this case which would bind the state of Illinois or control its action.

The governor, it is true, was empowered by the act to authorize the water to be let into the channel on the receipt of a certificate, by commissioners appointed by him to inspect the work, that the channel was of the capacity and character required. This was done, and the water was let in on the day when the application was made to this court for leave to file the bill. The governor had discharged his duty, and no official act of Illinois, as such, remained to be performed.

Assuming that a bill could be maintained against the sanitary district in a proper case, I cannot agree that the state of Illinois would be a necessary or proper party, or that this bill can be maintained against the corporation as the case stands.

The act complained of is not a nuisance per se, and the injury alleged to be threatened is contingent. As the channel has been in operation for a year, it is probable that the supposed basis of complaint can now be tested. But it does not follow that the bill in its present shape should be retained.

In my opinion both the demurrers should be sustained, and the bill dismissed, without prejudice to a further application, as against the sanitary district, if authorized by the state of Missouri.

My brothers Harlan and White concur with me in this dissent.

SYRACUSE TP., HAMILTON COUNTY, KAN.,

v.

ROLLINS.

(*Circuit Court of Appeals, Eighth Circuit, October 29, 1900.*)

(104 Fed. Rep. 958.)

Appeal and Error—Review - Findings of Fact.—The sufficiency of the evidence to support special findings of fact made by a circuit court cannot be reviewed on a writ of error.

Syracuse Tp., Hamilton County, Kan., *v.* Rollins

Municipal Bonds—Defenses—Estoppel by Recitals.*—A municipal corporation cannot attack the validity of negotiable bonds issued by it in the hands of *bona fide* purchasers for value on the ground that the records do not show a proper and legal canvass of the votes cast at the election called to determine whether such bonds should be issued, where the bonds recite the performance of all required conditions precedent to their issuance. Even if the recitals could be contradicted, it could only be by showing the nonassent of the voters, and not merely formal omissions.

Same—Validity.—That municipal bonds which were to run 10 years are made payable more than 10 years after their date does not affect their validity where they were not actually issued until within 10 years prior to their maturity.

Trial—Erroneous Entry of Findings—Power to Correct Record.—That what purported to be the findings of the court in a case, but were not in fact such findings, were inadvertently entered of record, did not preclude the court from setting them aside when the error was discovered, or deprive it of jurisdiction to proceed with the consideration of the case, as though they had not been entered.

In Error to the Circuit Court of the United States for the District of Kansas.

The trial court made a special finding of facts which supersedes the necessity of any other statement of the case. The court's findings are as follows:

"(1) That the plaintiff is a resident and citizen of the state of New Hampshire.

"(2) That the defendant is a resident and citizen of the state of Kansas, and a municipal township and body corporate, in the county of Hamilton and state of Kansas, duly organized and existing under the laws of Kansas, and possessed the power and authority as such to issue the bonds and coupons in suit, to contract and be contracted with, to sue and be sued, and do all other acts and things necessary and convenient for the exercise of its corporate powers.

Case Stated.

"(3) That the plaintiff herein filed his petition and began this action on the 25th day of August, 1897, and that the defendant has been duly served with process, filed its answer, and made a general appearance herein; and that the matter in dispute and in controversy in this action, exclusive of interest and costs, exceeds the sum and value of $2,000.

"(4) That the defendant duly issued, executed, and delivered the bonds and coupons in suit, being bonds of the face value of $4,500, being forty-five bonds for $100 each, with interest thereon at 8 per cent. per annum, payable semiannually, as evidenced by interest coupons attached to each of said bonds, all of said bonds and coupons bearing date the 1st day of June, 1887, which bonds were due, and payable to bearer at the fiscal agency of the state of Kansas in the city of New York on the

*See notes at end of case.

1st day of July, A. D. 1897, on presentation of the same; as also said coupons were payable at the same place on presentation as they respectively became due.

"(5) That each of the bonds in suit is negotiable in form, and payable to bearer, and recites on its face the following: 'This bond was issued in accordance with the provision of an act of the legislature of the state of Kansas entitled "An act amendatory of and supplemental to chapter sixty-eight of the Session Laws of 1872 entitled 'An act to authorize counties, incorporated cities and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water-power or other works of internal improvement and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith, and to repeal chapter 29 of the Session Laws of 1869, and to provide for the issuing of railroad and other bonds, and to limit the issuing of school bonds, and to punish the officers herein named for a violation of the provisions of this act,' approved March 9, 1874." And it is hereby certified and recited that all acts, conditions, and things required to be done precedent to and in issuing of said bonds have been propely done, happened, and performed in regular and due form as required by law.'

"(6) That the bonds in suit were duly presented to the auditor of the state of Kansas, and by him duly registered, as provided by law; and said auditor, under his seal of office, duly certified upon each of said bonds that it had been regularly and legally issued, and that the signatures thereto were genuine, and that the same were registered in his office according to law on the 12th day of August, 1887, and within thirty days after said bonds had been delivered.

"(7) That on or about the 25th day of March, 1887, a petition signed by about one hundred and sixty voters of said Syracuse township, the same being more than two-fifths of the voters of said township, was duly presented to the trustee, clerk, and treasurer of said Syracuse township, they being the township board of said township of Syracuse, asking that a special election be called and ordered, and a vote be taken upon the question as to 'whether bonds shall be issued whose face value shall be $5,200 with which to secure for the public a free bridge over the Arkansas river, beginning at the N. W. corner of lot number two, section number eighteen, township number twenty-four, and range forty, and terminating on the opposite bank of said river.'

"(8) That on the 25th day of March, 1887, the township board of said township of Syracuse, as aforesaid, after consideration of said petition, ordered a special election to be held in said township on the 26th day of April, 1887, for the purpose of 'determining whether the proposition to purchase the bridge now spanning the Arkansas river at the N. W. corner of lot number two, section eighteen, township twenty-

four, range forty, and terminating on the opposite bank of said river, and issue the bonds of said Syracuse township, whose face value shall be $5,200.00 in payment for said bridge.' That due notice of such election by publication was given as provided by law, and said election was duly held in said township in pursuance of said order and notice on the 26th day of April, 1887; at which election one hundred and seventeen legal votes were cast in favor of said proposition and the issuance of said bonds, the same being more than three-fifths of the votes cast at such election, and which was unanimous, there being no votes cast against said proposition and against the issuance of said bonds at said election.

"(9) That the judges and clerks of said election, they being the election board, duly conducted said election, received the votes, and counted and returned the same as provided by law; and said election and votes and return were duly canvassed, and the result of said election declared in favor of the issuing of said bonds as provided by law, by the township board at a meeting at which W. H. Olmsted and H. W. Stillhamer, treasurer and trustee, were present, the record not showing that the clerk was present.

"(10) That the officers of said township of Syracuse at a regular township board meeting on the 20th day of July, 1887, duly issued the bonds and coupons in suit, the bonds being forty-five in number, of the face value of $100 each; said township of Syracuse and the officers thereof having been enjoined, and judgment rendered in an action brought for that purpose, from issuing more than $4,500 face value of said bonds, because it was alleged that such excess was more than 5 per cent. value of the taxable property of said township of Syracuse, and said $4,500 face value of said bonds, being not greater than 5 per cent., inclusive of all other bonded indebtedness, of the taxable property of such township; and said injunction judgment is still in full force and effect.

"(11) That said bonds so issued as aforesaid were duly and legally registered by the officers of said township in the book kept for that purpose, and the township officers of said township of Syracuse at the time of issuing said bonds duly made out and transmitted to the auditor of the state of Kansas a certified statement of the number, amount, and character of the bonds so issued, as provided by law, which statement was duly attested by the clerk of said township, and the corporate seal of said township attached thereto.

"(12) That within thirty days after the delivery of the bonds in suit the same were duly presented to the auditor of the state of Kansas for registration, and said auditor of state duly registered the same in his office in a book kept for that purpose, and under his seal of office certified in writing upon each of said bonds that it had been regularly and legally issued, that the signatures thereto were genuine, and that the same was registered in his office according to law on the 12th day of August, 1887.

"(13) That the bonds and coupons sued on in this action were issued and delivered in payment for a bridge spanning the Arkansas river in said Syracuse township, Hamilton county, state of Kansas, and sold to the defendant by one James H. Bullen; that said bridge was received by said defendant in payment of said bonds about July 30, 1887, since which time the defendant has owned, and the citizens of said township have used and enjoyed, and still use and enjoy, said bridge, and have participated in all the benefits and advantages attending such ownership and use.

"(14) That shortly after the issuance and registration of said bonds, and before they, or any of them, or any installment of interest became or was due thereon, or any of said coupons became due, the plaintiff in good faith, for a valuable consideration, in the usual course of business, and relying upon the facts as recited therein, and the registration indorsed thereon, as aforesaid, and without any notice of any defect in the preliminary proceedings or requirements in the issuance or execution thereof, purchased said bonds and coupons, and is now the holder and owner of the bonds and coupons in suit in good faith. And that the defendant during each year after the issuance of said bonds up to the year 1897 levied and caused to be collected of the taxpayers of said township of Syracuse taxes for the purpose of paying the interest on said bonds as evidenced by coupons thereto attached as such coupons respectively became due, and paid all and singular said interest, except the last two installments or coupons falling due on the 1st day of July, 1897, and sued on herein.

"(15) That there is due the plaintiff from the defendant on and on account of the bonds and coupons sued on herein the sum of $5,619.06."

George Getty, for plaintiff in error.

A. B. Jetmore and A. P. Jetmore, for defendant in error.

Before Caldwell, Sanborn, and Thayer, Circuit Judges.

Caldwell, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Six of the assignments of error are to the effect that the facts found by the trial court are not supported by the evidence. But it is well settled that when the trial court to which a cause has been submitted makes a special finding of facts this court has no authority to inquire whether the evidence supports the findings, but only whether the facts found support the judgment. Lehnen v. Dickson, 148 U. S. 71, 77, 13 Sup. Ct. 481, 37 L. Ed. 373; Myers v. Hettinger, 37 C. C. A. 369, 94 Fed. 370; Supreme Lodge v. England, 36 C. C. A. 298, 94 Fed. 369; Minchen v. Hart, 36 U. S. App. 534, 18 C. C. A. 570, 72 Fed. 294; Hill v. Woodbury, 4 U. S. App. 68, 1 C. C. A. 206, 49 Fed. 138.

Appeal and Error—Review—Findings of Fact.

It is assigned for error that "no lawful canvass had been made by the board of county commissioners, or by any one, of any election held for the purpose of issuing the bonds in suit." The eighth and ninth findings of fact distinctly state that the election was held; that the vote was unanimous in favor of a proposition to issue the bonds, there being 117 votes in favor of it and none against it; and "that the judges and clerks of said election, they being the election board, duly conducted said election, received the votes, and counted and returned the same as provided by law, and said election and votes and return were duly canvassed, and the result of said election declared in favor of the issuing of said bonds as provided by law, by the township board at a meeting at which W. H. Olmsted and H. W. Stillhamer, treasurer and trustee, were present, the record not showing that the clerk was present." This assignment cannot prevail in the face of these findings. Moreover, under our decisions the recitals in the bonds preclude the defendant from raising this question. Brown v. Ingalls Tp., 57 U. S. App. 611, 30 C. C. A. 27, 86 Fed. 261. In the case last cited it was distinctly held by the court that it is the fact of the assent of the voters, and not the certificate of that fact, or the canvass of the vote, which confers the right to issue the bonds.

Municipal Bonds—Defenses—Estoppel by Recitals.

It is next assigned for error "that the bonds run for a longer period than that specified in the petition presented to the township board asking for the election." The recitals in the bonds are a complete answer to this objection. Moreover, it is shown to be without foundation in fact by the special finding of facts. The bonds were to run 10 years. They were payable on the 1st day of July, 1897, and, though they bear date the 1st day of June, 1887, the court finds they were not issued until the 20th day of July, 1887, so that they matured in a little less than 10 years from the date of their issue, which is the date from which to compute the time they had to run. They became binding obligations on the township from the date of their issue only. City of South St. Paul v. Lamprecht Bros. Co., 31 C. C. A. 585, 88 Fed. 449, 455.

Same—Validity.

Another assignment of error is "that the sum appropriated for the issuance of said bonds was in excess of the sum which could be appropriated by a township in the construction and purchase of a bridge." It is not very clear what is meant by this assignment. In appellant's brief it is treated in a double aspect: First, as raising the question that the bonds voted were in excess of 5 per cent. of the value of the taxable property of the township; and, second, as raising the question that the township could not, under the laws of Kansas, purchase a bridge costing more than $200. Conceding both of these points to be properly raised, they are without merit. The amount of bonds voted for the purchase of the bridge was

slightly in excess of the 5 per cent. limit, but as to this excess the township officers were enjoined from issuing bonds, and the bonds actually issued were not in excess of 5 per cent. of the value of the taxable property of the township. See eleventh special finding. At the time the bonds in suit were voted and issued, we understand, from the brief of counsel, that chapter 68 of the Session Laws of 1872, found in chapter 12a, Gen. St. Kan. 1889, was in force. Section 1 of that act provides:

"The board of county commissioners of any county, the mayor, and common council of an incorporated city, and the trustee, clerk and treasurer of any municipal township in this state are hereby empowered to issue the bonds of such county, city or township, in any sum not greater than five per cent., inclusive of all other bonded indebtedness, of the taxable property of such county, city or township, for the purpose of building or purchasing bridges, free or otherwise, * * *."

It will be observed that the only limitation imposed on the power of a township to issue bonds for the purpose of building or purchasing bridges is that the amount shall not be greater than 5 per centum, inclusive of all other bonded indebtedness, of the taxable property of the township. The validity of the bonds was not affected by legislation subsequent to their issue.

It appears from the record that, after the cause was duly submitted to the court, what purported to be findings of fact and conclusions of law of the court in the cause inadvertently found their way onto the record. Subsequently, when the error was discovered, the court entered the following order:

"The findings of law and fact and order heretofore made in the above-entitled cause, and filed on the 2d day of December, 1898, are hereby set aside for the reason that the same were inadvertently filed and entered. The attorneys for the plaintiff and the defendant are allowed until the second day of the next term of court to submit special findings of fact and conclusions of law for the consideration of the court."

The parties did submit special findings of fact and conclusions of law to the court in pursuance of the leave given them in this order. It is now for the first time objected that when the order which we have quoted setting aside the findings of fact inadvertently filed was entered, the court could not proceed further to consider the case "without a new waiver of a jury and a new trial and submission of the cause"; but there had been no trial of the cause in the sense that the court had reached a final judgment therein. The findings of fact and conclusions of law which found their way upon the records are shown to have been inadvertently entered of record, and not to express the judgment of the court in the case. For that reason the court very properly set them aside, and continued to consider the case upon the proofs submitted at the trial. No suggestion was made that it had lost jurisdiction to try the case, or that a

Trial—Erroneous Entry of Finding—Power to Correct Record.

Notes

new agreement to try the case before the court was necessary, but both parties acted on the assumption, supported by the record, that the trial of the case had not been completed by any finding or judgment of the court, and that it was still before the court on the original submission and the testimony heard at that time. In view of these facts, the suggestion that the court had lost jurisdiction to try the case, and that its judgment is erroneous for that reason, cannot be entertained.

The writer of this opinion has not heretofore concurred in the very extended and sweeping operation and effect given to recitals in municipal bonds by the majority of this court; but the views of this court are very little in advance of the recent decisions of the supreme court of the United States (Commissioners v. Rollins, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689), and as a law-abiding citizen the writer acquiesces in these decisions, though he does not believe in the doctrine to the extent to which it has been carried, and which compels municipal corporations to pay bonds issued illegally, fraudulently, and without consideration because a rascally officer inserts a false recital in them. It is a gratifying fact that this case presents none of the odious features which often characterize the issue of municipal bonds. Here the bonds voted by the people were honestly applied by the officers of the township to the purpose for which they were voted. The people of the township got just what they voted for, and for a less price than they were willing to pay for it, and have had the use and enjoyment of the property from the date of its purchase. Interest was paid on the bonds for nine years, and the effort to repudiate them at this late day is, upon the facts found by the circuit court, without legal or moral merit. The judgment of the circuit court is affirmed.

NOTES.

Effect of Recital in Bonds—Estoppel to Deny Validity.—In St. Joseph Township *v.* Rogers, 16 Wall. 644, CLIFFORD, J., in delivering the opinion of the court said: "Bonds, payable to bearer, issued by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the legislature, *are valid commercial instruments*; but if issued by such a corporation which possessed *no power* from the legislature to grant such aid, they are invalid, even in the hands of innocent holders. Such a power is frequently conferred *to be exercised in a special manner*, or subject to certain regulations, conditions, or qualifications, but if it appears that the bonds issued show by their *recitals* that the power was exercised in the manner required by the legislature, and that the bonds were issued in conformity with those regulations, and pursuant to those conditions and qualifications, proof that any or all of those recitals are incorrect will not constitute a defense to the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officer who

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executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition or qualification it is alleged was not fulfilled."

Rule in United States Supreme Court.—When bonds recite on their face that all the steps necessary for a valid issuance have been taken, it is the settled rule of the supreme court of the United States that a municipality is estopped from showing the contrary. Town of Andes *v.* Ely, 158 U. S. 312; Commissioners *v.* Aspinwall, 21 How. (U. S.) 544; Citizens' Sav. & Loan Ass'n *v.* Perry Co., 156 U. S. 692; Evansville *v.* Dennett, 161 U. S. 434; Board of Com'rs *v.* Sutliff, 97 Fed. Rep. 270; Buchanan *v.* City of Litchfield, 102 U. S. 278; Pana *v.* Bowler, 107 U. S. 529; Oregon *v.* Jennings, 119 U. S. 74; Chaffee Co. *v.* Potter, 142 U. S. 355; School District *v.* Stone, 106 U. S. 186; Supervisors of Carroll County *v.* Smith, 11 U. S. 556; Van Hostrup *v.* Madison City, 1 Wall. 291; Ogden *v.* County of Daviess, 102 U. S. 634; Hayes *v.* Holly Springs, 114 U. S. 120; Hackett *v.* Ottawa, 99 U. S. 86; Town of Coloma *v.* Eaves, 92 U. S. 284; Moran *v.* Miami Co., 2 Black 722; Supervisors *v.* Schenk, 5 Wall. 772; Rogers *v.* Burlington, 3 Wall. 654; Mercer Co. *v.* Hackett, 1 Wall. 83; Myer *v.* Muscatine, 1 Wall. 385; Gelpcke *v.* Dubuque, 1 Wall. 175; Grand Chute *v.* Winegar, 15 Wall. 572; Nauvoo *v.* Ritter, 97 U. S. 389; Warren *v.* Marey, 97 U. S. 96; Lyons *v.* Munson, 99 U. S. 604; Menasha *v.* Hazard, 102 U. S. 126; McCall *v.* Town of Hancock, 10 Fed. Rep. 8; Woods *v.* Lawrence Co., 1 Black 386; Bissell *v.* Jeffersonville, 24 How. 287; Pendleton Co. *v.* Amy, 18 Wall. 297; Randolph Co. *v.* Post, 93 U. S. 502; Leavenworth Co. *v.* Barnes, 94 U. S. 70; Douglass Co. *v.* Bolles, 94 U. S. 104; Commis. of Johnson Co. *v.* Thayer, 94 U. S. 631; Cass Co. *v.* Johnson, 95 U. S. 360; Daviess Co. *v.* Huidekoper, 98 U. S. 98; Venice *v.* Murdock, 92 U. S. 494; Anthony *v.* Gasper Co., 101 U. S. 693; San Antonio *v.* Mehaffey, 96 U. S. 312; Supervisors *v.* Galbraith, 99 U. S. 212; Menasha *v.* Hazard, 101 U. S. 126; Pompton *v.* Cooper Union, 101 U. S. 196; Douglass *v.* Pike Co., 101 U. S. 677; Darlington *v.* Jackson Co., 101 U. S. 688; Foote *v.* Pike Co., 101 U. S. 688; Roberts *v.* Bolles, 101 U. S. 119; Dodge *v.* Platte Co., 2 Am. & Eng. R. Cas. 583; Bonham *v.* Needles, 2 Am. & Eng. R. Cas. 642; Walnut *v.* Wade, 3 Am. & Eng. R. Cas. 36; Hopper *v.* Covington, 4 Am. & Eng. R. Cas. 251; Cagwin *v.* Hancock, 5 Am. & Eng. R. Cas. 150; Clay Co. *v.* Society for Savings, 5 Am. & Eng. R. Cas. 170; Burr *v.* Charlton Co., 6 Am. & Eng. R. Cas. 584; Moultrie Co. *v.* Fairfield, 7 Am. & Eng. R. Cas. 194; American L. I. Co. *v.* Bruce, 12 Am. & Eng. R. Cas. 610; Lewis *v.* Commissioners of Barber Co., 12 Am. & Eng. R. Cas. 615; Northern Bank of Toledo *v.* Trustees, 110 U. S. 608, 15 Am. & Eng. R. Cas. 575; Dallas Co. *v.* McKenzie, 110 U. S. 686, 15 Am. & Eng. R. Cas. 622.

Recitals Not within Scope of Authority of Officers Issuing Bonds.—But when it is not within the general scope of the authority of the officers issuing the bonds to determine whether or not the particular condition has been complied with, recitals that the bonds have been duly issued will not estop the municipality to set up their invalidity. Floyd, Acceptances, 7 Wall. 666; Marsh *v.* Fulton Co., 10 Wall. 676; Gould *v.* Sterling, 23 N. Y. 464; Starin *v.* Genoa, 23 N. Y. 452; People *v.* Mead,

36 N. Y. 224; Treadwell *v.* Commissioners, 11 Ohio St. 183; Clark *v.* Des Moines, 19 Iowa 199; De Voss *v.* Richmond, 18 Gratt. 339; Cagwin *v.* Hancock, 5 Am. & Eng. R. Cas. 150; Buchanan *v.* Litchfield, 102 U. S. 278; National Bank *v.* Porter Township, 110 U. S. 608; Dixon Co. *v.* Field, 111 U. S. 83, 15 Am. & Eng. R. Cas. 595. For further authorities on this subject, see Village of Kent *v.* Dana, 4 Mun. Corp. Cas. 609, and *notes* at end of case.

Same—Recitals within Scope of Officer's Authority.—Where municipal bonds recite on their face that a constitutional limitation has not been exceeded, such recital, if made by officers authorized to make the recital, will estop the city to deny the validity of the bonds as against a *bona fide* purchaser unless it is shown that the buyer of such bonds had notice of their invalidity. Board of Com'rs *v.* Sutliff, 97 Fed. Rep. 270; Marcy *v.* Oswego Tp., 92 U. S. 637; Sherman Co. *v.* Simonds, 109 U. S. 735; Dallas *v.* McKenzie, 110 U. S. 686; Chaffee Co. *v.* Potter, 142 U. S. 355; Board of Com'rs, etc., *v.* Rollins, 173 U. S. 255; Gratton Tp. *v.* Chilton, 97 Fed. Rep. 145.

Recitals Do Not Estop Municipality without Power to Issue Bonds.—When a municipality has no power in the first instance to issue railroad-aid bonds, the recitals therein can have no effect to validate them, even in the hands of a *bona fide* holder. They are void *ab initio*. Barnes *v.* Lacon, 84 Ill. 461; Williams *v.* Roberts, 88 Ill. 1; Lippincott *v.* Pana, 92 Ill. 24; Sykes *v.* Columbus, 55 Miss. 115; Williams *v.* Keokuk, 44 Iowa 88; Marsh *v.* Fulton Co., 10 Wall. 676; Loan Ass'n *v.* Topeka, 20 Wall. 655; Aspinwall *v.* Co. of Daviess, 22 How. 364; Thompson *v.* Perrine, 103 U. S. 806; Harshman *v.* Bates Co., 92 U. S. 569.

Notice—Overdue Coupons Attached to Bonds.—If overdue coupons are attached to municipal bonds such fact alone does not constitute sufficient notice to put a purchaser upon his guard as to irregularities in the issue of such bonds. National Bank of North America *v.* Kirby, 108 Mass. 497; Boss *v.* Hewitt, 15 Wis. 260; Cromwell *v.* Sac. Co., 96 U. S. 58; Indiana & I. C. Ry. Co. *v.* Sprague, 103 U. S. 756, 2 Am. & Eng. R. Cas. 532.

LAHNER

v.

INCORPORATED TOWN OF WILLIAMS

(*Supreme Court of Iowa, Dec. 19, 1900.*)

[84 N. W. Rep. 507.]

Wrongful Arrest—Liability of City for Acts of Officer.*—A person arrested without cause by the officers of a municipal corporation, and confined in the lockup over night, without food or water, or protection from the cold, cannot recover from the corporation for injuries to his health, caused by the negligence of the authorities in not keeping the lockup in proper condition, since the police regulations of a municipal corporation are enforced by it.

*See Gray *v.* Mayor, etc., of Griffin, 4 Mun. Corp. Cas. 149, and *notes* at end of case.

Lahner v. Incorporated Town of Williams

Appeal from district court, Hamilton county; D. R. Hindman, Judge.

Action for personal injuries. Judgment for defendant, and the plaintiff appealed. Affirmed.

D. C. Chase, for appellant.

A. N. Boeye, for appellee.

Granger, C. J. The petition shows that the defendant is a municipal corporation under the laws of this state; that the officers of said corporation arrested plaintiff in 1898, without legal cause or excuse, and unlawfully, cruelly, and inhumanly treated him by imprisoning him in a certain dirty, filthy lockup, or calaboose, used by the defendant as a prison. The following are averments of the petition: "That the said calaboose was an unfit place in which to confine any person, being used as a privy, and being in a foul and filthy condition, and the floors thereof being covered with human excrement, etc.; that he was placed in the said calaboose about 7 o'clock p. m., and confined without any suitable protection against the cold, or any food or water, for the night; and that by reason of being so imprisoned by the said defendant in the said calaboose, and by reason of the neglect and misconduct of the said defendant in allowing the said calaboose to be in a filthy, unhealthy, and untenantable condition, and by reason of the inhuman treatment of said defendant, the plaintiff was caused great mental and bodily suffering, and was made sick in body, and his health has been greatly injured and impaired, and the damage to the health of said plaintiff was caused by the misconduct, carelessness, negligence, and the omission of the said defendant in not keeping the said lockup or calaboose in a fit and proper condition." A demurrer was interposed to the petition, which the court sustained, and the correctness of its ruling is for our determination.

The legal inference from the averments of the petition is that the acts complained of were done by the officers of the corporation in an attempt to enforce its police regulations, and the query is presented if a municipal corporation is liable for such acts. Outside of this state the authorities are divided on the question, and while no case, with facts like this, has before been presented to this court, cases involving the rule in question have been before us. In Calwell v. City of Boone, 51 Iowa, 687, 2 N. W. 614, such a question was presented, arising out of the unlawful acts of its officers in the arrest of a person, and his treatment thereafter; and this language is used: "The police regulations of a city are not made and enforced in the interest of the city in its corporate capacity, but in the interest of the public. A city is not liable, therefore, for the acts of its officers in attempting to enforce such regulations." The opinion quotes from Buttrick v. City of Lowell, 1 Allen, 172, as follows: "Police officers can in no sense be regarded as the

agents or servants of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government; but this does not render them liable for their unlawful or negligent acts." In Easterly v. Town of Irwin, 99 Iowa, 694, 68 N. W. 919, the substance of the above language is used, with the following conclusion: "In the matter of enforcing its police regulations the city acts as an agent of the state in the discharge of duties imposed by law for the promotion and preservation of the public good, and not as a mere private corporation in the management of its corporate concerns." In Lindley v. Polk Co., 84 Iowa, 308, 50 N. W. 975, we held the county not liable for injuries sustained by a prisoner to his health while confined in a county jail by reason of its unfit condition as a place for the confinement of prisoners. The case refers to Kincaid v. Hardin Co., 53 Iowa, 430, 5 N. W. 589, in which this court denied the liability of the county for injuries resulting from the defective construction of a court house, and refused to extend the established rule in this state as to the liability of the county for injuries resulting from the defective construction of bridges. The rule of these cases is so broad and comprehensive that there seems little room for discussion. They are cited and quoted from by appellee, and appellant has made no attempt to show them inapplicable, or to avoid their force. The cases seem conclusive of the question before us, and the judgment of the court below must be affirmed.

TABER

v.

CITY OF NEW BEDFORD.

(*Supreme Judicial Court of Massachusetts, Bristol, Nov. 28, 1900.*)

[58 N. E. Rep. 640.]

Payment of Money—Mistake of Law.—A board of license commissioners had been removed, and petitioned for a review. Plaintiff was granted a license by the new board, and, the mayor having told him that he would get his money back if the removal was revoked, he paid it to the treasurer, with a request, in writing, that it be returned if the removal was revoked, received a license, and gave a bond unconditionally recognizing that he had received it. The removal was revoked. *Held*, that plaintiff's money had been paid under a mistake of law, and therefore could not be recovered, since his request neither expressed nor implied a condition which attached to the license.

Same—Board of Commissioners—De Jure—De Facto.—Where a board of license commissioners was removed, and a new board appointed, and the order of removal was revoked, licenses issued by the new board were good as long as such board was in office, since it was not only a *de facto*, but a *de jure*, board during such period.

Taber *v.* City of New Bedford

Exceptions from superior court, Bristol county; Henry K. Braley, Judge.

Action by John G. Taber against the city of New Bedford to recover money paid for a liquor license. From a judgment for defendant, plaintiff brings exceptions. Overruled.

L. T. Willcox and W. C. Parker, for plaintiff.

L. Le B. Holmes and B. B. Barney, for defendant.

Holmes, C. J. This is an action to recover $1,000 paid by the plaintiff for a license to sell intoxicating liquors. The plaintiff got the instrument which he expected to get, but contends that he paid his money under such a contract or upon such a condition that he is entitled to have it back. The facts were these: An old board of license commissioners had been removed by the mayor on April 12, 1897, and a new board appointed. On April 15th the old board had petitioned a justice of the superior court for a review of the charges against them. While this petition was pending the new board sent the plaintiff notice that an application for a license which he had filed on April 1st was granted. Thereupon the plaintiff, having doubts as to what the effect of the decision of the judge of the superior court might be, had some talk with the mayor, the end of which was that the mayor said that he had had some protest struck off, and told the plaintiff to go in and pay for his license, and that, if the decision of the court went against him, he should have his money back. The plaintiff went into the city treasurer's office and paid his money, handing the treasurer at the same time a signed paper, saying that he tendered the license fee, "with the request that it be returned if the board as above constituted should not be declared legal." This was the document called by the mayor a "protest." The treasurer gave the plaintiff a receipt, presumably in the ordinary form, which he took to the license commissioners, and they gave him a license on his giving bond to the treasurer as required by Pub. St. c. 100, § 13. On May 7th the mayor's order removing the old board was revoked. The plaintiff tried to get his money back, and brought this action.

Case Stated.

It is too plain for extended argument that the plaintiff cannot recover. Looking at the form which the final transaction took, the plaintiff made an unconditional payment, with a simple request for repayment in a certain event, and gave a bond unconditionally recognizing that he had received a license. His request, construed in the light of the law, neither expressed nor implied a condition, but left him at the mercy of the proper authorities. His previous talk with another officer, who had no control over issuing of licenses, could not qualify the later transaction with the treasurer and the licensing board. Moreover, he was bound to know that the law required an absolute payment, as the condition of a license (Pub. St. c. 100, § 13); that the mayor had no right to intermeddle in the matter, or

Payment of Money—Mistake of Law.

authority to bind the city by the supposed promise; that his payment did not purport to be made in pursuance of such a promise; and that, if he took a license, any condition subsequent which he might attempt to annex to his payment was simply void. He got the instrument for which he paid his money, from the officers from whom he expected it, and whose tenure of office he understood. There was no mistake of fact. If, under a mistake of law, he supposed that there was a condition attached to his payment, or a further consideration in the form of a promise, it was his misfortune; so, if he was disappointed as to the board's remaining in power. We need not consider what would have been his position if the license had been wholly void (although even then the mistake would have been one of law alone), because it was not wholly void.

At least, until the order removing the old board was revoked, it was effectual. After the removal of the old board, the mayor had the right to appoint a new board at once. The new board, when appointed, was a licensing board, not only de facto (Coolidge v. Brigham, 1 Allen, 333; Martel v. City of East St. Louis, 94 Ill. 67), but de jure. When the order of removal was "revoked," to use the significant word of the statute, it was not rescinded from the beginning and made as if it never had been. That is not the meaning of "revoked," which imports that the order is in force until it is recalled. Further evidence that this is the intent of the statute is to be found in the fact that the procedure is not an appeal, but a petition for a review, which in other cases is understood to leave the thing to be reviewed standing up to the moment of a contrary judgment. It follows that the license granted to the plaintiff was good, at least so long as the new board was in office. If it was revoked, then he could not recover any part of what he paid for it. McGinnis v. Inhabitants of Medway, 176 Mass. 67, 57 N. E. 210.

Same—Board of Commissioners—De Jure—De Facto.

There is no ground for saying that the plaintiff's payment was less voluntary in this case than in Emery v. Lowell, 127 Mass. 138, 140. It does not seem necessary to give further reasons for our decision.

Exceptions overruled.

FOLK
v.
CITY OF MILWAUKEE.

(*Supreme Court of Wisconsin, Dec. 7, 1900.*)

[84 N. W. Rep. 420.]

Injury to Pupil—Defective Sewer—Liability of City.*—A municipal corporation is not liable for the death of a pupil in a public school in consequence of a defective sewer, the injury being occasioned in the performance of a public service.

*See notes at end of case.

Folk *v.* City of Milwaukee

Appeal from superior court, Milwaukee county; J. C. Ludwig, Judge.

Action by John Folk, administrator, against the city of Milwaukee. From a judgment for defendant, plaintiff appeals. Affirmed.

This is an action brought by the administrator of the estate of Florence Folk to recover damages for the death of said Florence, caused by the negligence of the defendant. The complaint alleged the death of Florence Folk, the intestate, on the 16th day of February, 1897, at the age of 17 years; that she left surviving, as her sole heirs at law, her father and mother; that the plaintiff was duly appointed administrator of her estate on the 20th of November, 1897, and has duly qualified as such; that during certain months of the year 1896 the deceased, Florence Folk, was lawfully attending school at one of the public school buildings owned and maintained by said city of Milwaukee, and that while so attending, without fault or negligence on her part, she was made sick by sewer gas which escaped from the sewer in said building by reason of the fact that such sewer was negligently and carelessly allowed to become out of repair and clogged up, with the knowledge of the city authorities, so that it failed to carry off the refuse matter contained in it, thereby creating a nuisance; that said Florence Folk died February 16, 1897, in consequence of sickness caused by said poisoning; that notice of the claim was served on the city officers January 14, 1898. A general demurrer to this complaint was sustained, and the plaintiff appeals.

Toohey & Gilmore, for appellant.

Carl Runge (C. H. Hamilton, of counsel), for respondent.

Winslow, J. (after stating the facts). The question is whether a city is liable for the death of a child lawfully attending one of its public schools, when such death is caused by negligently allowing the sewer of the school building to become clogged up. We think this question must be answered in the negative. This court early adopted and has consistently maintained the rule that a municipal corporation is not liable for injuries resulting from the acts or defaults of its officers where it is engaged in the performance of a merely public service, from which it derives no benefit in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by the law for the general welfare of the inhabitants or of the community. Hayes v. City of Oshkosh, 33 Wis. 314. The case cited was one where the negligence claimed was the negligence of firemen in the discharge of their duty, and the same principle has been applied to the acts of taxing officers, policemen, and health officers. Wallace v. City of Menasha, 48 Wis. 749, N. W. 101; Kuehn v. City of Milwaukee, 92 Wis. 263, 65 N. W. 1030; Kempster v. City of Milwaukee, 103 Wis. 421, 79 N. W. 411. That the city is per-

Notes

forming such a public duty in maintaining public schools cannot be doubted. The principle is thus stated in 1 Shear. & R. Neg. (5th Ed.) § 267: "The duty of providing means of education at the public expense by building and maintaining school houses, employing teachers, etc., is purely a public duty, in the discharge of which the local body, as the state's representative, is exempt from corporate liability for the faulty construction or want of repair of its school buildings, or the torts of its servants employed therein." The leading case upon the subject is probably the case of Hill v. City of Boston, 122 Mass. 344, where the whole field was very learnedly and exhaustively discussed. This case has been followed in principle by other courts. Wixon v. Newport, 13 R. I. 454; Donovan v. Board, 85 N. Y. 117; Hughes v. City of Auburn (N. Y. App.) 55 N. E. 389; Ford v. School Dist., 121 Pa. St. 543, 15 Atl. 812, 1 L. R. A. 607; Finch v. Board, 30 Ohio St. 37. While the exact question here presented is new in this court, the weight of authority (especially in Massachusetts, from which state we have so largely taken our doctrine as to municipal liability for torts) is so strong in favor of the rule quoted above that we feel no hesitation in following it. Nor is the rule unreasonable. Indeed, were a recovery possible under the facts stated here, no reason is perceived why damages might not be allowed for every sickness suffered by a scholar which could be traced to defective or injudicious heating, ventilation, or lack of ventilation of a school building. Such a result would be intolerable, and might necessitate the closing of schools, by the exhaustion of funds to discharge such judgments. We do not lose sight of the fact that there is another principle frequently approved by this court, namely, that a municipal corporation may not construct or maintain a nuisance in the street or upon its property to the damage of another, or negligently turn water or sewage upon the lands of another without liability. Gilluly v. City of Madison, 63 Wis. 518, 24 N. W. 137; Hughes v. City of Fond du Lac, 73 Wis. 380, 41 N. W. 407; Schroeder v. City of Baraboo, 93 Wis. 95, 67 N. W. 27. These cases all go upon the principle that the city cannot in the management of its corporate property create a nuisance injurious to the property or rights of others. In none of these cases were the city officers who were guilty of negligent or wrongful acts acting in a governmental capacity towards the person injured. In the present case, however, there can be no doubt that in the management of the school house the city officers were acting in a purely governmental capacity, as far as their relations to the deceased child were concerned. This consideration is, we think, controlling, and results in affirmance of the ruling of the trial court. Order affirmed.

NOTES.

Public School—Neglect of Duty—Liability of City.—In Finch *v.* Board of Education, 30 Ohio St. 37, METCALFE, J., said: "The question then is

whether the defendants are answerable on the facts in this case, for the special injury sustained by the plaintiff through their neglect to provide a safe place for her attendance at school. We are of opinion that they are not. The wrong which the facts show was not malfeasance, but mere neglect of that kind of corporate duty for neglect of which, as we have seen, a town is liable to a private action only when it is given by statute."

Illustrations.—In Hill *v.* City of Boston, 122 Mass. 344, the leading case on this subject, it was decided that a pupil, in a public school, injured by reason of a defective staircase, in the school house, could not maintain an action against the city to recover for such injury. See also, Sullivan *v.* Boston, 126 Mass. 540; Bigelow *v.* Randolph, 14 Gray (Mass.) 541; Flori *v.* St. Louis, 19 Mo. 341; Ham *v.* New York, 70 N. Y. 459; Bassett *v.* Fish, 75 N. Y. 303; Donovan *v.* Board of Ed. of New York City, 85 N. Y. 17; Brabham *v.* Sup. Hinds Co., 54 Miss. 363.

A municipality is not liable for an injury to a person caused by the negligent act of one of its servants while engaged in excavating for the foundation of a school house, such work being for the benefit of the public and a governmental duty. Howard *v.* City of Worcester, 153 Mass. 426, 27 N. E. Rep. 11.

A pupil injured by a defective heating apparatus in a public school house has no right of action against the city to recover damages for such injuries. Wixon *v.* Newport, 13 R. I. 454; Lane *v.* Dist. Township of Woodbury, 58 Iowa 462, 12 N. W. Rep. 478.

No action can be maintained against a board of education, in the absence of a statute creating liability, for an injury to a pupil at a public school caused by the negligence of such board. Kincaid *v.* Hardin Co., 53 Iowa 430, 5 N. W. Rep. 589.

PATRICK

v.

TOWN OF BALDWIN.

(*Supreme Court of Wisconsin, Feb. 26, 1901.*)

[85 N. W. Rep. 274.]

Justice of Peace—Appeal—Mistake in Notice.—Mistakes in a notice of appeal from a judgment rendered in justice court do not render such notice ineffective if it contains enough to identify, with reasonable certainty, the judgment, the parties and court, and to show that it was made by the party appealing, personally, or by some person or persons duly authorized, in its behalf of such party.

Same.—A notice of appeal from a judgment rendered in justice court against a town, signed by three persons with the word "Supervisor" under the last signature, the signatures and the official designation being so located that if the plural number were used instead of the singular it would clearly indicate that all signed officially, shows with

reasonable certainty that it was so signed, where there is no indication in the notice to the contrary.

Maintenance of Poor—Liability of City for Relief of.*—There is no legal obligation resting on a municipal corporation to maintain or relieve poor persons in the absence of a statute creating one, and the court has no power, upon the grounds of moral obligations or the equities of any given case, to hold such a corporation liable to a private person who may have relieved or supported a poor person.

Duty Imposed by Law—Neglect of Officers—Implied Liability of City.—Where the law imposes on a municipality the duty of maintaining poor persons, and designates officers thereof to act in its behalf in the performance of such duty, their mere neglect will not operate as an implied request to a private party to supply a needy person's wants, upon which such party can act and hold the municipality liable as upon an implied contract.

Same—Relief by Private Person—City Not Liable in Absence of Contract.—The statute requiring each town in this state to support poor persons in certain cases, and the supervisors thereof to see that such support is furnished, does not permit a private party to aid or relieve such a person at the expense of the town without a contract to that effect, made between him and such supervisors or a majority thereof.

(Syllabus by the Judge.)

Appeal from circuit court, St. Croix county; E. W. Helms, Judge.

Action by J. B. Patrick against the town of Baldwin. Judgment for plaintiff before a justice was dismissed, and plaintiff appeals. Affirmed.

Case Stated.

The cause was commenced against the defendant town in justice court, wherein such proceedings were had that judgment was duly rendered in plaintiff's favor for $101 damages and $20.91 costs, for services rendered as a physician in attending Richard Bruaas, a poor person, having a legal settlement in said town, without any direction or employment by the supervisors of said town, or either of them, and, so far as the complaint states the facts, without any notice to such supervisors or either of them, or any knowledge on their part of the rendition of such services or the necessity therefor. Within the time required by law an appeal from such judgment was attempted to be taken by the supervisors of the town to the circuit court. Each of such supervisors made an affidavit in due form of law for the purposes of such appeal, in which he testified that he made such affidavit in his official capacity. Such affidavits, with a paper intended as a notice of appeal in the action, were duly served on the justice. Such notice of appeal was signed as follows: "P. C. Finvond, Wm. Ferg, Jacob De Jong, Supervisor of the Town of Baldwin, Defendant." Such notice and affidavit were recognized by the justice to be in due form of law, and

*See notes at end of case.

sufficient to perfect an appeal from said judgment on the part of defendant, and the papers were accordingly certified to the circuit court. When the cause came on for trial in such court, plaintiff's attorneys moved for an order dismissing the appeal because the notice thereof was insufficient, which motion was denied, due exception being taken to the court's ruling. In due time objection was made to the reception of any evidence because the complaint failed to state facts sufficient to constitute a cause of action against defendant. The objection was sustained. Plaintiff's counsel then made application for leave to amend the complaint by alleging that on December 23, 1898, plaintiff caused the chairman of the board of supervisors of the town to be notified of the necessity for immediate medical services to be rendered to Richard Bruaas and of the fact of his being a proper subject for relief by the town, as a pauper. The application was denied. Judgment was thereupon rendered dismissing the action, with costs. Plaintiff's counsel excepted to each of the court's adverse rulings, including that on a motion made for a new trial.

A. J. & E. B. Kinney, for appellant.

James A. Frear, for respondent.

Marshall, J. (after stating the facts). The notice of appeal was sufficient. Strict accuracy is by no means necessary in such a paper in order to confer jurisdiction upon the appellate court. Mistakes, however numerous, are immaterial if the notice yet contains enough to fairly identify the judgment, the parties and the court, and to show that it was made by the party appealing, or some one authorized to do so, which authority need not expressly appear, it being sufficient if it be fairly inferable from the language of the notice and the manner in which it is signed. The law in that regard is too well settled to need any citation of authority to support it. The alleged defect in the notice is that it was not signed by the town of Baldwin, using the name of the town, or showing that some person or persons acted in the matter as agent or agents for the town, having authority so to do. A corporation must of necessity act by an agent, and that agent need not necessarily be an officer of the corporation, nor need any proof of the agency accompany the notice. If there is enough in a notice of appeal to indicate that it was made by a person assuming to act as agent of the appellant, though the agent in signing used only his name as such, his authority will be presumed till the contrary is shown. Benjamin v. Houston, 24 Wis. 309. The notice in question was signed by three persons, with the word "Supervisor" under the last signature, indicating that at least such signer acted in his official capacity for the town. We think it is fairly inferable that all the signers acted officially, and that

Justice of Peace—Appeal—Mistake in Notice.

Same.

by mistake the singular number was used instead of plural in specifying the official character.

The contention is made that inasmuch as by section 1499, Rev. St. 1898, the defendant was required to relieve Bruaas, no notice of his necessities to its supervisors was necessary to create a legal liability to one who voluntarily, from motives of humanity, administered to his wants, and that since by section 1501, Id., such supervisors were required to see that he was properly relieved, neglect on their part, after receiving notice from plaintiff of circumstances calling for action to that end, was tantamount to a request to plaintiff to perform the service required. To support those propositions, Mappes v. Board of Sup'rs of Iowa Co., 47 Wis. 31, 1 N. W. 359, is cited. That, with what is said in Davis v. Town of Scott, 59 Wis. 604, 18 N. W. 530, supports both propositions. If they declare the law correctly, the judgment appealed from is wrong. In the first case mentioned the claimant supported an old woman, who was a pauper, without notifying the municipal officers of the facts, and without knowledge on his part that such person's relatives had failed to comply with an order made according to law requiring them to supply her, rendering it necessary for public relief to be furnished, and without the claimant knowing that she was a pauper. The court held that such ignorance excused the claimant for not giving notice of the situation to the municipal authorities; that he was entitled to recover upon the ground of the legal obligation alone; that in view of such obligation the only thing that could preclude the claimant from recovering would be negligence on his part in failing to notify the proper officers so as to give them an opportunity to perform their duty in the matter, and that the claimant was not chargeable with such negligence, since he did not know that the person relieved was a pauper. No authority was cited to support the decision. Meyer v. Town of Prairie du Chein, 9 Wis. 233, was referred to on the general subject of the legal duty of a town to support paupers having a legal settlement therein. Such case does not refer even remotely to the principle upon which the Mappes Case turned, it being held in effect that a contract between the town authorities and the party furnishing the relief was necessary to give the latter a legal claim against the former. There was a recovery in the court below, and no bill of exceptions on the appeal. In that situation this court said that it would be presumed that a proper contract was made entitling the claimant to recover. The rule of the Mappes Case, to its full extent, has never been followed in this court, or at all here, except in Davis v. Town of Scott. In several cases it has been in effect overruled by holdings that a claim against a municipality for the relief of a pauper must be based on an express or implied contract, actually made between the claimant and the proper officials.

Maintenance of Poor—Liability of City for Relief of.

Cases exist holding that a public corporation may be held

liable without even notice to its officers having authority to act in its behalf, of the necessity for relief to be given a pauper, but they are based on statutes to that effect, as, for instance, by section 12, c. 16, Rev. St. Vt., in force when Town of Charlestown v. Town of Lunenburg, 23 Vt. 525, was decided, it is provided that in certain emergencies a person furnishing relief to a pauper, until the lapse of a reasonable time for notifying the proper public officers of such pauper's needs, can recover therefor of the municipality in which such relief is furnished, and that if, after such notice, such officers neglect to perform their duty, he can continue to furnish such relief and look to such municipality for his pay. We have no such statute. There is much judicial authority to the effect that if one furnish necessary relief to a poor person, after notice to the public officers of the pauper's needs and neglect on their part to perform their duty, he may recover therefor as on an implied contract. Most of such authority, however, is based on statutes, as, for examples, section 18, c. 46, Rev. St. Mass., in force when Smith v. Inhabitants of Colerain, 6 Metc. 492, was decided, provides that, "every town shall be held to pay any expense which shall be necessarily incurred for the relief of a pauper, by any person who is not liable by law for his support, after notice and request made to the overseers of the said town, and until provision shall be made by them;" part 1, § 4, c. 2, tit. 15, Gen. St. Conn., in force when Wile v. Town of Southbury, 43 Conn. 53, was decided, was to the effect that any person relieving a poor person after notice to the proper public officers of the needs of such poor person, and a neglect of such officers to perform the duty, may recover therefor upon an implied contract. Section 48, c. 32, Rev. St. 1841 Me., in force when Perley v. Inhabitants of Oldtown, 49 Me. 31, was decided, is to the same effect; but in Beetham v. Inhabitants of Lincoln, 16 Me. 137, it was decided that in the absence of a statute making it the duty of a municipality to relieve a poor person standing in need thereof, and neglect of its proper officers to attend to the matter, after receiving notice of such need, sufficient to constitute an implied request by such officers to another to furnish relief, such circumstances do not create contract relations between such municipality and such other upon which the latter can recover of the former. Seagraves v. City of Alton, 13 Ill. 366, is to the opposite effect, but it is not a well considered case, as is evidenced by the fact that none of the authorities cited supports the conclusion reached. It holds that the legal obligation of a municipality to support a poor person, and neglect of its officers to act in its behalf, is sufficient to warrant the court in inferring a promise by such officers, to one who stands in place of the municipality and prevents the suffering that would otherwise result from the neglect of its agents, to compensate him therefor. The case went to the full extent of holding that such a promise will be

Duty Imposed by Law—Neglect of Officers—Implied Liability of City.

inferred in certain emergency cases even in the absence of any neglect on the part of municipal officers. The decision followed closely the lines of those cases we have referred to that are based on statutes, seemingly ignoring the rule often laid down that, while there is a strong moral obligation resting upon organized society to relieve all poor persons in its midst standing in need thereof, there is no legal obligation to do so in the absence of a statute creating it, and that the courts cannot go further than the legislative will has been expressed. To what extent, under what circumstances, at what place and by what agencies poor persons shall be relieved at the expense of the public, are all purely legislative questions. When the legislature has gone no further than to create a legal obligation to support poor persons, and to designate municipal agents to incur the necessary obligations to that end, no such obligation can exist without some clearly-expressed municipal consent given by such agents. In short, where the statute contemplates that all liabilities for the support of the poor shall rest on contract, that is the exclusive way of incurring them, and a meeting of minds is just as essential to such a contract as to any other. The doctrine thus stated is generally recognized as controlling. In Overseers of the Poor of North Whitehall v. Overseers of the Poor of South Whitehall, 3 Serg. & R. 117, often cited on the subject discussed, it was said, "Whatever may be the duty of individuals, from religious or charitable considerations, it is certain, the public is bound by no moral obligation to support the poor of the community. That duty, being legal and of positive institution, is to be carried no further than the express provisions of the poor laws." In Smith v. Inhabitants of Colerain, 9 Metc. (Mass.) 432, the situation was this: The statute expressly made a town liable on an implied contract in certain but not in all cases of a person furnishing necessary relief to a pauper whom such town was legally bound to support. Relief was furnished to such a person by a private party, the officers of the town having refused to do so. The person relieved was not at the time located where the law required as a condition of an implied contract to pay for such relief, when furnished by a private party, though he was where the overseers of the poor placed him and might have continued to support him. In deciding the case Chief Justice Shaw said: "There was no express undertaking to pay the plaintiff; and whether a contract could be implied depends upon the statute liability. * * * It has been too often decided to be now questioned, that the liability of towns to support poor persons is founded upon and limited by statute, and is not to be enlarged or modified by any supposed moral obligation."

In McCaffrey v. Town of Shields, 54 Wis. 645, 12 N. W. 54, it was said that, "the defendant town cannot be held liable * * * unless its supervisors, or at least two of them, requested" the service to be performed. The court did not feel

called upon to overrule Mappes v. Board of Sup'rs of Iowa Co., because the facts in the two cases were different, though it seems that the principle involved, of whether a contract is necessary upon which to found a legal liability against a town for the relief of a poor person, was decided differently in the one case than in the other.

In Town of Dakota v. Town of Winneconne, 55 Wis. 552, 13 N. W. 559, it was held that a contract is necessary to a liability of the kind in question, though it is not necessary that the supervisors act in a body in making it; that if one supervisor request the service to be rendered, with the knowledge and tacit consent of another, and the person furnishing the relief rely upon the conduct of the two as a joint request, it is within reason to say that there is a meeting of minds, and a contract made.

In Davis v. Town of Scott, 59 Wis. 604, 18 N. W. 530, the court held squarely that the liability of a town, to compensate a person furnishing support to a proper subject for relief as a poor person, is fixed by notice to the supervisors to take charge of such subject, and their neglect to do so. It was said that the case was distinguishable from McCaffrey v. Town of Shields. That is true as to the facts, but why it is as to the principle of whether some clear indication of a request to furnish relief is necessary to a contract obligation of the town to pay the person performing that service, is not perceived. It seems that an error was committed in that case. Sections 1513, 1514, Rev. St. 1878, not now in force, were in substance as follows: "If any poor person shall become a charge for support to a town in which he has no legal settlement, any town in this state in which such person has such settlement shall be liable over to the former upon condition of its supervisors giving to at least one of the latter's supervisors notice of the facts and requiring them to take charge of such person. If he shall not be so taken charge of within thirty days after such notice, and all expenses be paid up to such taking, the delinquent town shall be liable to the other for such expenses and all others incurred while such person remains a public charge." Town of Dakota v. Town of Winneconne, supra, arose under such statutes. The defense was made that the plaintiff was not entitled to recover because it did not, acting by its full board of supervisors, contract for the relief furnished and audit the expense thereof. This court, after deciding that a request by two of the supervisors of the town to furnish the relief, satisfied all the requisites of a contract under the previous decisions of the court, said that the town ultimately liable could not be heard to complain of any irregularity in regard to making the contract and auditing the claims by the town primarily liable, since the person relieved was a legitimate charge upon the former and notice to its supervisors of the facts, and a request of them to take charge of such person, was all that was necessary to fix its liability to

the plaintiff town. This language was used: "The plaintiff town having given the defendant town the requisite notice to take charge of the pauper, the liability of the latter became fixed." "It could not, by neglecting its own legal duty, compel the plaintiff to make the expenditure in question, and then defeat its claim therefor because such expenditure was not made by authority of the full board." The court properly said, on the facts of that case, that notice to the town in which the pauper had a legal settlement fixed its liability to the town primarily liable for the relief, because such was the express mandate of the statute. In Davis v. Town of Scott, the liability was claimed under sections 1499, 1501. Only that part of Town of Dakota v. Town of Winneconne holding that a contract between the supervisors of the plaintiff and the person furnishing the relief was requisite to its liability therefor to such person, applied. The idea that the part holding that notice to the town responsible over fixed its liability to the town primarily liable, applied, manifestly was a mistake. For that reason the case cannot be considered as authority ruling the case before us.

In Jones v. Town of Lind, 79 Wis. 64, 48 N. W. 247, there was proof of a general request by the chairman of the board of supervisors to furnish relief and make monthly reports. Relief was furnished on the faith of such request, reports thereof were made, and bills therefor paid, up to the expiration of such chairman's term of office. He and his associate supervisors supposed that the arrangement was to end with their term of office. He testified to that as a conclusion, though there was nothing in what was said between him and the claimant indicating that the contract was not to continue so long as necessary. Such claimant supposed it was not to terminate without express notice to that effect, if the necessity continued. He was never notified to discontinue his service. The need therefor remained unchanged, and the person served continued to be a proper town charge. The action was for services rendered after the term of office of the supervisors employing the claimant expired. It was held that he was not entitled to recover, the court saying: "As a town can only be chargeable for services rendered by virtue of some contract therefor, we think the circuit court was clearly justified in holding that plaintiff had no cause of action."

In Beach v. Town of Neenah, 90 Wis. 623, 64. N. W. 319, there was notice to the chairman of the town and a promise by him that the destitute persons should have whatever they needed; and it was said that the evidence was sufficient to show that the supervisors of the town consented that the person giving notice, and to whom the declaration was made, should care for such persons at the expense of the town until they were otherwise cared for.

It is believed that the law, that an obligation against a town for services rendered in relieving a poor person who is

entitled by law to be so relieved, can only be incurred in the manner indicated in the statute, was recognized and correctly declared in Meyer v. Town of Prairie du Chien, McCaffrey v. Town of Shields, Town of Dakota v. Town of Winneconne, Jones v. Town of Lind, Beach v. Town of Neenah, and Putney Bros. Co. v. Milwaukee Co. (Wis.) 84 N. W. 822; that the agents empowered to act for the municipality in such matters must, either by express contract or by some act or acts from which a contract can be reasonably inferred, bind such municipality, or it cannot be bound at all. Mere passive neglect is not sufficient.

Same—Relief by Private Person—City Not Liable in Absence of Contract.

The statute, as has been said, does not indicate that the supervisors must act in a body in contracting for the relief of a poor person. The nature of the duty in such cases is not consistent with such a requirement. The statute must have a reasonable, sensible construction, in view of the duty imposed. It says "the supervisors" shall see that poor persons are taken care of as required by law. That clearly indicates that at least a majority must consent to relief being furnished to a pauper at the expense of their town in order to bind it. If one supervisor acts with the knowledge and consent of another, given either expressly or by his keeping silent when good faith requires him to speak, it may properly be inferred that the two concur in the matter and that there is a sufficient meeting of minds between the proper municipal agents and the person furnishing relief, to satisfy all the essentials of a contract. While an implied contract is sufficient, as indicated, it must be established, if one endeavors to recover upon it, the same as any other implied contract. The statute creates a liability to relieve destitute persons, but not a liability to individuals who may voluntarily perform that service. It empowers appropriate agents of municipalities to make their liability effective by all necessary contracts to that end, and imposes upon such agents the duty to exercise such power. If they refuse to do so, they are doubtless amenable in some way for such misconduct, but the law gives no private person the right to perform the duty of such officers. Otis v. Strafford, 10 N. H. 352. Performance of that duty by the person designated by law is absolutely essential to create a binding obligation upon the municipality to compensate one for relieving a poor person, legally entitled to relief at its expense. If the statutes on the subject are defective, it is not for the court to judicially extend them. They came to us from Massachusetts indirectly, having been adopted by Michigan, then by this state. It must be presumed that there was a purpose in making the change which we have pointed out between the Massachusetts statute and our own, for, without the change, mere neglect of the supervisors of a town to act when they ought to act for the relief of a poor person, would give a private party, not liable by law to furnish such relief, and residing in such town, the right to do so at the expense

thereof. There is no more reason for holding that a person may aid a pauper, upon the supervisors of the town in which such pauper has a legal settlement neglecting their duty, and hold such town liable therefor, than for holding that one may repair the highways of a town because its supervisors neglect their duty in that respect, and recover of such town therefor. The duty of the municipality in both cases is regulated by statute, and in neither case can it be bound to a private person for services rendered except by contract made as contemplated by law.

From what has been said it follows that the complaint was insufficient and that the objection to any evidence under it was proper. There was not even a suggestion in the complaint that the supervisors of the respondent town had notice of the necessity for furnishing the relief for which the claim was made. The application for leave to amend was properly denied, if for no other reason, because it alleged mere notice to the chairman of the board of supervisors of the respondent, that Bruaas was a proper town charge and stood in immediate need of relief as such, and that the person giving such notice, the appellant here, was under no legal obligation to furnish such relief. The amendment followed closely the line of decisions to which we have referred, based on express statutes creating a liability under such circumstances. Smith v. Inhabitants of Colerain, supra.

The judgment is affirmed.

NOTES.

Paupers—Duty of City—Implied Contract.—There is no implied contract that a town shall pay for services or relief given to a pauper, which was not afforded at its special request. Putney *v.* Dummerston, 13 Vt. 370; Churchill *v.* West Fairlee, 17 Vt. 447; Rowell *v.* Vershire (Vt.), 8 L. R. A. 708.

Same—Duty Imposed by Statute.—Where, by statute, a duty is imposed on a city to provide for its poor, a contract will be implied on its part to reimburse a person who had supplied a pauper with necessaries. Seagraves *v.* Alton, 13 Ill. 376.

And if there be no adequate remedy at law a writ of *mandamus* will lie to compel commissioners of the poor to discharge duties imposed upon them by statute. Lynah *v.* St. Paul's Par. Comm'rs, 2 McCord (S. Car.) 170; State *v.* Mitchell, 2 Tr. Const. (S. Car.) 703.

McDONALD
v.
CITY OF ST. PAUL.

(*Supreme Court of Minnesota, Jan. 23, 1901.*)

[84 N. W. Rep. 1022.]

Purpose of Street—Right of City to Set Apart as Boulevard.—The plaintiff was thrown down and injured by a wire stretched along the

boulevard at a street corner, and this is an action to recover damages for her injuries. *Held*:

The primary purpose of a public street is to accommodate public travel, but whenever any portion of a street not devoted to business purposes can be set apart for park or boulevard purposes without any substantial impairment of such primary purpose, the city may set such portion apart for a boulevard.

Care of Boulevard.—When a city has rightly set apart and improved a part of a street for a boulevard, it is not bound to use due care to keep such part free from all obvious obstructions which are necessarily incident to its use as a boulevard, although they may endanger the safety of travelers thereon.

Same—Obstructions—City Cannot Maintain on Boulevard.*—But a city has no right to maintain, or permit others to do so, on its boulevards, and especially on those at the street corners, anything in the nature of a dangerous pitfall, or trap, or snare, or like obstruction, whereby the traveler may be injured.

Negligence—Question for Jury.—The question of the negligence of the defendant in this case and of the plaintiff was rightly submitted as one of fact to the jury.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Charles E. Otis, Judge.

Action by Marion McDonald against the city of St. Paul. From a judgment rendered on the verdict, plaintiff appeals. Affirmed.

J. E. Markham and F. W. Root, for appellant.

Daniel W. Doty and T. J. Wheeler, for respondent.

Start, C. J. The plaintiff, on the evening of December 2, 1899, while attempting to cross the street diagonally at the southwest corner of Marshall and Dewey avenues in the city of St. Paul, was thrown to the ground by a wire stretched along the boulevard at the street corner, whereby she was injured. She brought this action to recover damages for personal injuries so sustained on the ground that the city was negligent in permitting the wire to be in the street. Verdict for the plaintiff for $250. The defendant moved for judgment in its favor notwithstanding the verdict, which was denied, and it appealed from the judgment entered upon the verdict. The undisputed facts in this case, briefly stated, are these: Marshall avenue runs east and west, and is 100 feet wide, and is crossed at right angles by Dewey avenue, 66 feet wide. The central 52 feet of Marshall avenue are graded and prepared for a roadway. Through the center of this roadway two street-car tracks are maintained and used for passenger traffic. On either side of this roadway are

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*See *note* at end of case on liability of city for injury from obstructions on boulevard.

boulevards 18 feet wide, and outside them are plank sidewalks 6 feet wide. On the dividing lines between the roadway and the boulevards are stone curbs. The boulevards are graded on a level with the sidewalks and the top of the curb. Grass and shade trees are growing on the boulevard. On Dewey avenue the boulevards are 11 feet wide. There is a walk across Marshall avenue on the west line of Dewey avenue, and the sidewalk to the south side of Marshall west of Dewey continues across the boulevard and into the roadway of Dewey avenue. At the intersection of Marshall and Dewey, and between the crosswalks and the curb, at the southwest corner, is an oblong portion of boulevard 11 by 18 feet. On the 18th day of November—two weeks before the accident—the owner of the adjoining property set out a tree near the center of the oblong tract. To support the tree, a small wire was wound around the tree about 4 or 4½ feet from the ground, and fastened, one end thereof, to a stake driven into the ground at a point 22 inches north of the crosswalk leading to Dewey avenue, and 3 feet and 2 inches inside the curb, and the other end thereof to a stake driven into the ground at a point about 7 feet and 3 inches north from the tree, and about 5 feet and 5 inches from the crosswalk leading across Marshall avenue. The tops of the stakes were driven nearly level with the surface of the ground. The stakes and wire could be readily seen by daylight, but not at night. The plaintiff, on the evening in question, and after dark, was walking rapidly (as she was afraid she would miss a car) on the sidewalk on the south side of Marshall avenue for the purpose of taking the car which was to stop on the east side of Dewey avenue. When she reached the corner, she attempted "to cut across"—that is, to cross diagonally—the oblong portion of the boulevard we have described, and in so doing she was caught by the wire, and thrown down and injured. While she could not see the wire, she observed the tree, and the surface of the ground, which appeared to be free from obstructions. The evidence as to the locus in quo indicates that pedestrians who were in a hurry, and knowing nothing about the wire, would be quite apt to "cut across the corner." The side and cross walks were in a condition of safety, and the plaintiff would not have been injured if she had kept thereon. The place of the accident was in the residence district of the city, but it was about five miles from the center of the city, and was somewhat sparsely populated. A mounted policeman, however, patroled the district for 22 hours each day, passing the corner in question frequently. It was his duty to report to his chief any defects in the streets or sidewalks discovered by him. The defendant requested the trial court to direct a verdict in its favor on the ground that, as a matter of law, upon the undisputed evidence, the defendant was not guilty of any negligence in the premises, but the plaintiff was guilty of negligence which was the proximate cause of the accident.

This was refused by the court, and the ruling is here assigned as error. The main question to be here considered is whether, upon the special facts of this case, the alleged negligence of the defendant was a question of law or fact. The contention of the defendant is that when, as in this case, a municipality sets apart, marks out by curbing or otherwise, and improves a portion of a street as a boulevard, it is notice to the public that such part of the street is not intended for travel, and that any person who, without any necessity, and solely for his own convenience, uses it instead of the sidewalk, assumes all risk of injuries from obstructions thereon; or, in other words, that the city when it has so withdrawn and improved a part of the street, is not bound to maintain it in a condition of safety for pedestrians who leave the safe sidewalk, and go upon the boulevard. The plaintiff, on the other hand, claims, as we understand her counsel, that when a city improves a street to its full width pedestrians have a right to travel on any part of the street, including the boulevard, without any necessity for so doing, and that the city is bound to exercise due care to keep all parts of the street relatively safe for public travel. The right of a municipality to determine within reasonable limits what part of a street in a residence district shall be set apart for the roadway for travel of all kinds, what part for sidewalks for the exclusive use of pedestrians, and what part for boulevards with grass, trees, and flowers planted thereon, is now undoubted. There are adjudged cases, decided in the early history of municipalities, when the stern taste and asceticism of the times could see no other use for a public street except as a means of getting from one place to another, which are not in harmony with the rule we have stated. But in this state streets are laid out or dedicated for many purposes other than the accommodation of public travel in the ordinary way. They are intended for the purpose of furnishing light and air, and in the residence districts for boulevarding portions of them, thereby adding to the beauty of the city, and contributing to the health and happiness of its citizens. Of course, the primary purpose of a street is to accommodate public travel, but whenever any portion of a street not used for business purposes can be set apart for park or boulevard purposes without any substantial impairment of such primary purpose, the municipality may set apart such portion for boulevards and other similar public purposes. Having such right, and the marking out and improving of the boulevard being notice to pedestrians that it is not intended for the purposes of travel, it logically follows that the municipality is not bound to use due care to keep such portion of the street free from all obvious obstructions which are necessarily incident to its use as a boulevard, although they may endanger the safety of travelers thereon, even conceding, without so deciding, that a pedestrian, in the absence of a law

Purpose of Street—Right of City to Set Apart as Boulevard.

Care of Boulevard.

Note

or ordinance prohibiting it, has the technical legal right to travel wherever he pleases in the street. While this is true, yet the municipality has no right to maintain, or permit others to do so, on its boulevards, and especially on those at the street corners, anything in the nature of a dangerous pitfall or trap, or snare, or like obstruction, whereby the traveler, yielding to the impulse of the average person to cut across the corner when in a hurry, may be injured. The trial court in substance so instructed the jury. Now, can it be held, as a matter of law, that the facts of this case do not bring it within this rule? This, in the last analysis of the evidence, is the pivotal question, and we answer it in the negative. It will serve no practical purpose to repeat or discuss the facts, for we are of the opinion that they present a fair question upon which reasonable men might, and probably would, draw different conclusions. If the accident had occurred on the boulevard between the block lines, instead of the one at the street corner, the case would not be so clearly one for the jury. The question of the defendant's negligence and that of the plaintiff, including the assumption of the risk, was rightly left by the court to the jury. Judgment affirmed.

Same—Obstructions—City Cannot Maintain on Boulevard.

Negligence—Question for Jury.

Collins, J. If this accident had occurred anywhere upon the boulevard except at the corner, I am of the opinion that, on the authorities, there could have been no recovery. But, in view of the fact as to the place where plaintiff was tripped, I think the case was for the jury.

NOTE.

Injury from Obstruction on Boulevard—Boulevard as Street.—In Burridge *v.* City of Detroit, 117 Mich. 557, which was an action for an injury sustained by reason of an obstruction on a sidewalk of a boulevard, it was held, that a boulevard 150 feet wide of which 60 feet is graded and the remainder occupied by grass plots, had all the characteristics of a highway and, although such boulevard is under the direction and control of park commissioners, who are a city agency, the city is as much liable for its defective condition as if it had been under the direct control of the city council. And the fact that more than the usual space on each side was devoted to a lawn distinguishes it from an ordinary street in only a degree. Such boulevard is held to be a street and the city is as much liable for defects therein as if it were an ordinary highway.

For liabilities of a city for injury from defective streets, see generally, City of Denver *v.* Hyatt, *ante*, p. 132, and *notes* at end of case.

STATE *ex rel.* BUMP

v.

OMAHA & C. B. RY. & BRIDGE CO.

(*Supreme Court of Iowa, Jan. 19, 1901.*)

[84 N. W. Rep. 983.]

By-Laws—Statutory Provision—Publication.—The term "by-laws of a general or permanent nature," used in Code 1873, § 492, requiring publication of such by-laws, and providing that they shall take effect and be in force at the expiration of five days after they had been published, includes a city ordinance granting a franchise.

Validity—Franchise—Street Railway.—All steps essential to the validity of a city ordinance granting a franchise to a street railway must be taken before the power to grant the franchise is withdrawn, or it will be void.

Method of Publication—Statutory Mode Must Be Complied with.*—The publication of a city ordinance in an extra edition of a daily newspaper, and the distribution of 50 to 100 copies of such edition by parties interested in the ordinance, is not a publication in a newspaper of general circulation, as required by Code 1873, § 492.

Ordinance—Discrimination in Rates.—A city ordinance permitting a street-railroad company engaged in interstate commerce under franchises granted by the city to make discrimination in rates in favor of residents of the city against residents of another state is unconstitutional, because it conflicts with the interstate commerce clause of the federal constitution.

Same—Special Privilege.—The Council Bluffs city ordinance giving residents of that city the special privilege of obtaining transportation on a street railroad at a less rate than other residents of the state violates Const. art. 1, § 6, which requires that all laws of a general nature shall have uniform operation.

Appeal from district court, Pottawattamie county; A. B. Thornell, Judge.

This is an action to test the validity of an ordinance passed by the city of Council Bluffs on September 20, 1897, amending an ordinance of the same city, passed in 1886, conferring upon defendant, as a corporation, the power to construct, operate, and maintain street railways in the city of Council Bluffs. The lower court held that the ordinance in question was invalid for want of proper publication, and also on the ground that it provided for certain discriminations in fares in behalf

*See notes at end of case.

of the citizens of Council Bluffs, which rendered it unconstitutional; but it upheld the ordinance as against the objection that it was unreasonable and contrary to public policy. Both parties appeal and assign errors. Affirmed.

Wright & Baldwin, for appellant.

Harl & McCabe, for appellee.

McClain, J. The objection to the ordinance that it was not properly published is based on the following facts: The ordinance was passed on September 20, 1897, while the provisions of the Code of 1873 were still in force. It was signed by the mayor at 9 o'clock on the evening of the 30th day of the same month. On the 1st day of October the Code of 1897 took effect, under the provisions of which it was not competent for the council to grant such a franchise without submission of the question to a vote of the people of the city. If the ordinance did not take effect as a valid act before the 1st day of October, it is not valid at all, for no submission of the question was made or provided for. Section 492 of the Code of 1873 provides that "all ordinances shall as soon as may be after their passage be recorded in a book kept for that purpose and be authenticated by the signature of the presiding officer of the council and the clerk, and all by-laws of a general or permanent nature * * * shall be published in some newspaper of general circulation in the municipal corporation: * * * provided, however, that if no such newspaper is published within the limits of the corporation, then and in that case such by-laws may be published by posting * * * and such by-laws and ordinances shall take effect and be in force at the expiration of five days after they have been published." About 11 o'clock at night on the 30th of September a so-called extra edition of a daily paper published in Council Bluffs was issued, containing a publication of this ordinance, and also of another ordinance of similar character. From 50 to 100 copies of such edition were printed, all of which were purchased by persons directly interested in the ordinance in question, which were sold on the streets and on trains by the persons who procured them for this special purpose. On October 1st the ordinance was published in due form in the regular edition of the same paper. It is contended on behalf of plaintiff that publication of the ordinance was essential to its validity, that the publication in the extra edition was not such publication as was required, and that therefore the ordinance did not become a valid act prior to the taking effect of the Code of 1897, and is not valid now. But defendant insists that the publication was sufficient, and that, even if it was not, publication was not essential to the validity of the ordinance, or, if required at all, might be made after the provi-

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By-Laws—Statutory Provision—Publication.

sions of the Code of 1873, under which it was enacted, had been superseded by the provisions of the Code of 1897. The term "by-law of a general or permanent nature," used in the section of the Code of 1873, certainly includes ordinances such as that which we have before us. A by-law is "a law made by a municipality for the regulation of affairs within its authority; an ordinance." Cent. Dict. "In general and professional use the term 'ordinance' is almost, if not quite, equivalent in meaning to the term 'by-law,' and is the word most generally used to denote the by-laws adopted by municipal corporations." 1 Dill. Mun. Corp. (4th Ed.) § 307. The ordinance in question was of a general and permanent nature, and plainly was within the term "by-law" used in the statutory provision. The section of the Code of 1873 above referred to provides that such by-laws "shall take effect and be in force at the expiration of 5 days after they have been published." We are of the opinion that publication is essential to the validity of such an ordinance. Until published it does not take effect. To insist that it is a valid ordinance, although not published, and that a subsequent publication is simply a condition to its enforcement, would be no more reasonable than to insist that it is valid when passed by the council, and that the signature of the mayor is merely a subsequent condition necessary to its going into operation. If the ordinance did not take effect until five days after it was published, then it did not take effect at all until after the Code of 1897 came into force; and, under section 776 of that Code, no such franchise can be granted or renewed unless submitted to a vote of the electors, and a majority of the legal electors voting thereon vote in favor of the same. If this ordinance did not become a valid ordinance before the 1st day of October, 1897, it has not become an ordinance at all. See State v. Dawson, 16 Ind. 40, where it is held that a corporate charter granted by special act, which had not become valid by acceptance prior to the taking effect of a constitutional provision forbidding the granting of charters in that manner, did not afterwards become valid by acceptance. In our opinion, the publication was one of the steps necessary to make this a valid ordinance. The provision about publication is not directory only, but compliance with it is essential to the validity of an ordinance. This step not having been taken as required by law, and during the time when such an ordinance might be passed, the ordinance fails. It may be further said that the ordinance itself contains a provision that it shall take effect and be in force "after its publication according to law." If it was not published according to law within the time during which such an ordinance might lawfully be enacted, it was not published "according to law" at all.

Validity—Franchise—Street Railway.

We have assumed in the preceding statement that there was

no sufficient publication on the 30th of September. It is hardly necessary to cite authorities to show that a publication in an extra edition of 50 or 100 copies issued at 11 o'clock at night, and not mailed to subscribers or otherwise distributed, except as sold by parties directly interested, was not an official publication. The following cases, however, will be found in point: Pratt v. Tinkcum, 21 Minn. 142; Tully v. Bauer, 52 Cal. 487; Scammon v. City of Chicago, 40 Ill. 146; Ormsby v. City of Louisville, 79 Ky. 197.

Method of Publication—Statutory Mode Must Be Complied with.

The other objection to the ordinance was also, as we think, correctly sustained. It is provided therein that, as one of the considerations for the extension of the franchise, defendant "shall constantly keep at its principal office in Council Bluffs and in some convenient central locality, for sale to the residents of Council Bluffs for a sum not to exceed $1.50, commutation tickets good for thirty rides for thirty days from the date of issue, from any point on its line in Council Bluffs over its bridge to any point in Omaha to which its cars may be operated * * * and from said point in Omaha over its bridges and lines to any point of its lines in Council Bluffs, which said ticket shall be nontransferable and irredeemable except for unavoidable casualty." There can be no question but that defendant, whose business, under this franchise, included the transportation of persons between Council Bluffs and Omaha, was engaged in interstate commerce, and any regulation of rates discriminating in favor of the citizens of this state as against those of another state must necessarily be invalid. Guy v. City of Baltimore, 100 U. S. 434, 25 L. Ed. 743; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158; Railway Co. v. Smith, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858. In the last case, which was one involving the validity of a statute of Michigan which required the sale of railroad 1,000-mile tickets to citizens of the state at rates lower than the maximum rate of transportation, the court said: "The question is presented in this case whether the legislature of a state, having power to fix maximum rates and charges for the transportation of persons and property by railroad companies, with the limitations above stated, and having power to alter, amend, or repeal their charters, within certain limitations, has also the right, after having fixed a maximum rate for the transportation of passengers, to still further regulate their affairs, and to discriminate and make an exception in favor of certain persons, and give to them a right of transportation for a less sum than the general rate provided by law."

Ordinance—Discrimination in Rates.

Furthermore, the ordinance is invalid under the provision of the constitution of Iowa (article 1, § 6) which requires that laws of a general nature shall have uniform operation. This ordinance does not operate uniformly as to all persons who would be entitled to ride on the cars of

Same—Special Privilege.

Notes

defendant company, but gives a privilege to those who are citizens of Council Bluffs not enjoyed by other citizens of the state. Both objections are well stated in the case of Town of Pacific Junction v. Dyer, 64 Iowa, 38, 19 N. W. 862, where this court held that an ordinance requiring transient merchants to pay a certain license, and defining a transient merchant to be "every nonresident person who shall sell, exchange," etc., was unconstitutional, because, so far as it discriminated against nonresident merchants of Iowa, it was in conflict with the commerce clause of the federal constitution, and, as far as it discriminated in favor of resident merchants of a town, it was in conflict with the state constitution, and that, as the town council derived its power from the legislature of the state, it could not do what the legislature could not do. See, also, City of Marshalltown v. Blum, 58 Iowa, 184, 12 N. W. 266; City of Stuart v. Cunningham, 88 Iowa, 191, 193, 55 N. W. 311, 20 L. R. A. 430.

Affirmed

NOTES.

Publication of Ordinances.—It is frequently provided by statute that a municipality shall publish its ordinances. Until this is done, they have no binding effect and no penalties can be recovered under and by virtue of them. State *v.* Hoboken, 38 N. J. L. 110; Hoboken *v.* Gear, 27 N. J. L. 3 Dutch. (N. J.) 265; Conboy *v.* Iowa City, 2 Iowa 90; Higley *v.* Bunce, 10 Conn. 567; Barnett *v.* Newark, 28 Ill. 62; Creighton *v.* Manson, 27 Cal. 613; Knight *v.* Kansas City, St. J., etc., R. Co., 70 Mo. 231; Baltimore *v.* Little Sisters of the Poor, 56 Md. 400; Schwartz *v.* Oshkosh, 55 Wis. 490; Queen *v.* Justices, 4 Q. B. Div. 522; Haskell *v.* Bartlett, 34 Cal. 281; Napa *v.* Easterby, 61 Cal. 509, 10 Conn. 436; Tisdale *v.* Minonk, 46 Ill. 10; Barnett *v.* Newark, 28 Ill. 62; Longbridge *v.* Huntington, 56 Ind. 253; Meyer *v.* Fromm, 108 Ind. 208; Baltimore *v.* Johnson, 62 Md. 225; Van Alstine *v.* People, 37 Mich. 523; Matter of Smith, 52 N. Y. 528; Matter of Bassford, 50 N. Y. 509; Matter of Levy, 4 Hun (N. Y.) 501; Waln *v.* Philadelphia, 99 Pa. St. 330; Marshall *v.* Comm., 59 Pa. St. 455; Schwartz *v.* Oshkosh, 55 Wis. 490; Clark *v.* Janesville, 10 Wis. 136.

When Provision as to Publication Deemed Directory Only.—Some authorities, however, hold the provisions requiring publication to be merely directory, and compliance with them is not therefore viewed as essential to the validity of the ordinance. Striker *v.* Kelly, 7 Hill (N. Y.) 9; Elmendorf *v.* Mayor of New York, 25 Wend. (N. Y.) 693; Blanchard *v.* Bissell, 11 Ohio St. 96.

Same.—By revised ordinances of the city of Boston it is provided that ordinances shall be published for two consecutive weeks in three daily newspapers, but there is no provision that such ordinances shall be of no effect until published. In construing this provision the court held it to be merely directory only, that such ordinance contemplated publication after the enactment of an ordinance and a compliance with it is not a condition to the validity of the ordinance. Comm. *v.* Davis,

140 Mass. 485, 4 N. E. Rep. 577; Elmendorf *v.* Mayor of New York, 25 Wend. (N. Y.) 693.

Illustrations—Publication in Regular Issue of Paper.—Publication only in the regular issues of a newspaper is sufficient where an improvement act requires such publication in a newspaper as often as the same is issued. Perine *v.* Lewis, 6 Pac. Rep. 422.

Same—Notice of Non-Publication.—Notice of an ordinance not being published, as required, three weeks before its adoption and the day of such proposed adoption not being specified in the notice, such ordinance will be void. Quint *v.* City of Merrill, 105 Wis. 406, 81 N. W. Rep. 664.

Same—Compliance with Method Prescribed.—If the manner of publication of ordinances of a city council is prescribed by the legislature, such ordinances cannot be validly passed unless the council publishes them in the manner so directed. State *v.* Mayor, etc., of Hoboken, 38 N. J. L. 110.

Same.—An order of a city council authorizing an improvement is void, if not published for three days in a newspaper as required by law. Matter of Smith, 52 N. Y. 528.

Same.—In Hastings *v.* Columbus, 42 Ohio St. 585, it was held that publication of an ordinance in a newspaper published only on Sunday was a valid notice of such ordinance.

Same.—If publication is required, by law, for five successive days, a notice in a newspaper published for five week days is sufficient even though a Sunday intervenes. *Ex Parte* Fiske, 72 Cal. 125, 13 Pac. Rep. 310.

Same—Validity of Bonds.—Bonds issued under an act authorizing a city to incur a debt are valid although there was a failure to publish the ordinance. Amey *v.* Allegheny City, 24 How. (U. S.) 364; Clark *v.* Janesville, 10 Wis. 136; People *v.* San Francisco, 27 Cal. 655; State *v.* Newark, 1 Vroom (N. J.) 303.

Same—Contract for Street Lighting.—Where a contract for street lighting is required to be published for one week in one or more newspapers in the town a notice that the petition was received by the city council is compliance within the meaning of the statute. Hendrickson *v.* City of New York, 160 N. Y. 144, 54 N. E. Rep. 680.

Same—Validity Depends on Statute.—Upon the statute governing the method of publication of city ordinances, depends the question as to the validity of publication. Warsop *v.* Hastings, 22 Minn. 437; Law *v.* People, 87 Ill. 385; Mayor of Hoboken *v.* Gear, 27 N. J. L. 265; Higley *v.* Bunce, 10 Conn. 436.

WALKER *et al.*
v.
TOWLE.

(*Supreme Court of Indiana, Jan. 4, 1901.*)

[59 N. E. Rep. 20.]

Statutory Authority—Nuisances—Dogs Running at Large.*—Under Burns' Rev. St. 1894, §§ 3541, 3615, 3616 (Horner's Rev. St. 1897, §§ 3106, 3154, 3155), authorizing cities to enact ordinances for the protection of life, health, and property, they have the power to declare what shall

constitute a nuisance, and prevent or abate the same; and, having such power, may pass ordinances requiring owners of dogs to securely muzzle them, and directing the marshal to kill all dogs found running at large without muzzles.

Ordinance—Delegation of Legislative Powers—Mayor as Agent of Council.—An ordinance requiring the mayor, whenever he apprehends danger from hydrophobia, to issue a proclamation compelling all owners of dogs to muzzle them for not less than 30 nor more than 90 days, and requiring such owners to obey the proclamation, is not invalid as attempting to delegate legislative powers to an executive officer; the mayor in such case merely acting as the agent of the council, and the ordinance being enforceable, after the proclamation, according to its own provisions.

Same—Run-About Dog—Action for Killing.—Under Burns' Rev. St. 1894, § 2857 (Acts 1891, p. 453, § 2), making it unlawful for any dog to roam about the country unattended by its owner, and making it lawful to kill any such dog, it is a sufficient answer to an action against an officer for killing a dog on the streets of a city that it was roaming about unattended by its owner.

Appeal from circuit court, Porter county; J. W. Youche, Special Judge.

Action by Edward E. Towle against Allison A. Walker and another. From a judgment for plaintiff, defendants appeal. Reversed.

Peter Crumpacker, for appellants.

A. F. Knotts, for appellee.

Case Stated.

Monks, J. Appellee brought this action against appellants to recover damages for killing appellee's dog. A hearing by jury resulted in a verdict, and, over a motion for a new trial, judgment in favor of appellee.

It is assigned for error that the court erred in sustaining appellee's demurrer to appellants' second paragraph of answer. Said second paragraph of answer is, in substance: That the city of Hammond, on a public street of which appellee's dog was killed, is and was a duly-incorporated city in this state. That appellants, Mott and Walker, were, at the time Walker shot said dog, the mayor and marshal, respectively, of said city. That at the time of the killing of said dog there was in full force and effect an ordinance in said city as follows:

"Section 1. Be it ordained by the common council of the city of Hammond that whenever the mayor of said city may apprehend that there is danger of the existence or the spread of hydrophobia within or near said city, he shall issue a proclamation ordering and requiring all persons owning, possessing, or harboring, or having the care of any animal of the dog kind within the limits of said city, either to confine or muzzle such animal for a term not less than thirty nor more than ninety

*See notes at end of case.

days ensuing the date of such proclamation, and upon the issuing of such proclamation it shall be the duty of all persons owning, possessing, or harboring, or having the care of any animal of the dog kind during the term mentioned in said proclamation to confine such animal securely within such house or structure or to some substantial fastening upon his or her premises, so as to prevent such animal from biting or being bitten by other animals, or to cause such animals to be securely and effectually muzzled; and no muzzle shall be deemed sufficient unless it be of such form and strength and so attached and fastened as will effectually prevent any such animal from biting. During the time mentioned in such proclamation any animal of the dog kind which may be found running at large within the city without being muzzled is hereby declared to be a nuisance. Any person failing to comply with the provisions of this section shall be fined in any sum not less than three nor more than twenty-five dollars.

"Sec. 2. Upon the issuing of any such proclamation by the mayor in pursuance of the preceding section of this ordinance, it shall be the duty of the marshal and policemen respectively, to kill any animal of the dog kind found running at large within the city during the times mentioned in such proclamation, without being securely muzzled as required by this ordinance. And it shall be lawful for any person or persons to kill any and all such unmuzzled dogs during such time."

It was further alleged in said paragraph that appellant Mott, acting as mayor of said city, apprehended that there was danger of the existence and spread of hydrophobia within and near said city, and did, then and there, on the 19th day of June, 1895, issue his proclamation, ordering all persons to confine or muzzle their dogs from June 21, 1895, to September 1, 1895, pursuant to the terms of said ordinance; that the dog when killed was within the city limits, and was found then and there running at large upon the public highways, and was not then and there muzzled, and was unprovided with any means whatsoever to prevent him from biting, and was then and there roaming about over the country unattended by its owner or any agent of its owner; that appellant Walker, being then and there the marshal of said city, and finding said dog under said circumstances, shot and killed said dog as he lawfully might. Copies of said ordinance and proclamation are set out in said paragraph. It is insisted by appellee that said ordinance is invalid, because the common council had no power to pass an ordinance providing for the killing of dogs.

Municipal corporations possess, and can only exercise, such powers as are granted by the legislature in express words, and those necessarily or fairly implied or incident to the powers expressly granted, and those essential to the declared objects and purposes of the corporation. No incidental powers can be implied except such as are essential to the accomplishment of the purposes of their creation and for their continued ex-

shall deem just, and in such case and during such suspension duties shall be levied, collected and paid upon sugar, molasses, coffee, tea and hides, the product of or exported from such designated country as follows, namely."

The court in that case, after quoting at length from the authorities sustaining such legislation, and citing a number of acts of congress conferring like powers upon the president, said: "That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of the government ordained by the constitution. The act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the president with the power of legislation. For the purpose of securing reciprocal trade with countries producing and exporting sugar, molasses, coffee, tea, and hides, congress itself determined that the provisions of the act of October 1, 1890, permitting the free introduction of such articles, should be suspended as to any country producing and exporting them that imposed exactions and duties on the agricultural and other products of the United States, which the president deemed—that is, which he found to be—reciprocally unequal and unreasonable. Congress itself prescribed, in advance, the duties to be levied, collected, and paid on sugar, molasses, coffee, tea, and hides produced by, or exported from, such designated country while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the president. The words, 'he may deem,' in the third section, of course implied that the president would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea, and hides, and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural and other products of the United States by a country producing and exporting sugar, molasses, coffee, tea, and hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which congress had determined should occur. He had no discretion in the premises, except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by congress. As the suspension was absolutely required when the president ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact, and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when congress declared that the suspension should take effect when a named contingency arose. What the president was required to do was simply in execution of that act of congress. It was

not the making of law. He was the mere agent of the law-making department, to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself, as it left the hands of congress, that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea, and hides from particular countries, should be suspended in a given contingency, and that in case of such suspensions certain duties should be imposed. 'The true distinction,' as Judge Ranney, speaking for the supreme court of Ohio, has well said, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.'' Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton Co., 1 Ohio St. 88. In Moers v. City of Reading, 21 Pa. St. 188, 202, the language of the court was: 'Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of law.' So, in Locke's Appeal, 72 Pa. St. 491, 498: 'To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future or impossible to fully know.' The proper distinction the court said was this: 'The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of the legislature.'' What is said by the court in Field v. Clark, supra, is applicable to the objections urged to said ordinance, and fully answers all the objections urged against the same by appellee, and is decisive of the case at bar.

Under the provisions of said ordinance, it was the duty of the mayor to ascertain whether or not there was danger of the existence or spread of hydrophobia in or near said city, and, if he found there was such danger, it was his imperative duty to issue the proclamation provided for, stating the time during which said ordinance would be enforceable, not less than 30 nor more than 90 days. When such proclamation was issued, it was in obedience to the command of the ordinance. In obeying the command of said ordinance the mayor did not exercise legislative power. He only declared the period dur-

ing which the same should be enforced, as provided by the lawmaking power of the city, and in so doing he was the agent of that body. Said ordinance was enforceable after said proclamation, for the term fixed, within the limits named, according to its own provisions. State v. Hauser, 63 Ind. 155, and Evansville, I. & C. S. L. R. Co. v. City of Evansville, 15 Ind. 395, cited by appellee, are not, therefore, in conflict with what we decide in this case.

The allegations of said paragraph of answer were also sufficient to justify the killing of said dog, under section 2857, Burns' Rev. St. 1894 (section 2, p. 453, Acts 1891), the substance of which was re-enacted in 1897 (Acts 1897, p. 178; sections 2864a–2864o, Burns' Supp. Rev. St. 1897). It follows that the court erred in sustaining the demurrer to the second paragraph of appellants' answer. Judgment reversed, with instructions to overrule the demurrer to the second paragraph of answer, and for further proceedings not inconsistent with this opinion.

Same—Run-About Dog—Action for Killing.

NOTES.

Dogs—Municipal Control.—The legislature of a state, under its police power, may authorize municipalities to summarily destroy property without legal process or previous notice to the owner, and the regulation of keeping of dogs and the authorization of their summary destruction when such regulation are not complied with, are within the police power of the legislature. Blair *v.* Forehand, 100 Mass. 136; Carter *v.* Dow, 16 Wis. 298; Harrington *v.* Miles, 11 Kan. 480; *Ex Parte* Cooper, 3 Tex. App. 489; Haller *v* Sheridan, 27 Ind. 494.

In State *v.* City of Topeka, 36 Kan. 76, 12 Pac. Rep. 310, the court said: "Under the almost unbroken current of authority we think that statutes and ordinances may be passed regulating, restricting or even prohibiting the running at large of dogs in cities, and this although dogs are unquestionably property; that the owners, keepers of, or harborers of dogs in cities may be required to register the same and to pay a registration fee therefor, although this fee may in one sense be a tax, though not a tax within the meaning of section 1, article XI, of the state constitution; that dogs in cities may be classified, and the owners, keepers of, or harborers thereof may be required to register all the dogs of one class and not the dogs of another class, and to pay a greater registration fee for the registration of the dogs of one class than for the registration of dogs of another class; and such owners, keepers or harborers of dogs may also be required to put collars around the necks of their dogs; and that any dog found running at large in a city, in violation of the statutes or ordinances, may be summarily destroyed, and that all this is constitutional and valid, and is 'due process of law,' and that by the same no one is denied 'the equal protection of the law.'" Bradford *v.* McKibben (Ky.), 4 Bush 545; Leach *v.* Elwood, 3 Ill. App. 453; Dinwiddie *v.* State, 103 Ind. 101, 2 N. E. Rep. 290.

Same.—In City of Faribault *v.* Wilson, 34 Minn. 254, it was held that the power to regulate the keeping of dogs and the right to impose fines,

Notes

forfeitures, and penalties for the enforcement of such regulation is within the police power.

Instances of Exercise of Power.—A city may, in the exercise of its police power, pass an ordinance requiring dog owners to apply to the city clerk for a collar, and pay a registry tax. Commonwealth *v.* Markham, 70 Ky. 487; Iola *v.* Sugg (Kan.), 56 Pac. Rep. 541.

Same—Power to Kill or Impound.—The killing or impounding of dogs found running at large is a valid exercise of the police power of a state, for the welfare and safety of its citizens. Morey *v.* Brown, 42 N. H. 373; The Washington *v.* Neigs, 1 McAuthur (D. C.) 53; Crauston *v.* Augusta, 61 Ga. 572.

Same—Sheep-Killing Dogs—Appropriation of Tax.—In Van Hom *v.* People, 46 Mich. 183, it was held that a law taxing dogs and appropriating the proceeds to payment of damage done by dogs to sheep is a valid exercise of its police power. Mitchell *v.* Williams, 27 Ind. 62.

Same—Running at Large.—A statute authorizing the killing of dogs running at large without a collar is held to be valid in Tower *v.* Tower, 18 Pick. (Mass.) 262.

But such power cannot be exercised by any one but an officer and a third party will be held liable for killing a dog even if he is at large, without collar or muzzle. Smith *v.* St. Paul City Ry. Co. (Minn.), 82 N. W. Rep. 577; Lowell *v.* Gathright, 97 Ind. 313; Chapman *v.* Decrow, 93 Me. 378, 45 Atl. Rep. 295.

And under this authority it is lawful for an officer to go upon the premises of the owner in order to kill a dog without a collar. Blair *v.* Forehand, 100 Mass. 136.

But he cannot enter a dwelling house without the owner's consent. Bishop *v.* Fahay (Mass.), 15 Gray 61.

Same—Owner Required to Muzzle.—In Commonwealth *v.* Chase, 6 Mass. 248, it was held that a by-law which required dogs running at large to be muzzled was valid.

Same—What Constitutes Running at Large.—In Woolf *v.* Chalker, 31 Conn. 121, it was held that a dog unconfined and unrestrained though on his owner's premises is running at large.

But when at play with his owner's son he is not at large. McAneany *v.* Jewett, 10 Allen (Mass.) 151.

A dog upon a public road, with no one near or having control of him is running at large. Nehr *v.* State, 35 Neb. 638, 53 N. W. Rep. 589; Commonwealth *v.* Dow, 10 Met. (Ky.) 382.

But even though in his master's presence, if he cannot be restrained and kept from doing mischief, he is held to be at large. Brown *v.* Carpenter, 26 Vt. 638, 62 Am. Dec. 603.

A hound kept for the chase, while trailing a fox, and out of sight of his master, who was following, was accidentally shot by the defendant in firing at the fox. *Held*, that the hound was not running at large within the meaning of a statute authorizing the killing of animals running at large, and that defendant was liable in damages. Wright *v.* Clark, 50 Vt. 130.

Power to Sell Estrays.—As to power of city to sell animals found running at large, see Armstrong *v.* Brown (Ky.), 1 Mun. Corp. Cas. 765, and *notes* at end of case.

UPPINGTON

v.

CITY OF NEW YORK.

(*Court of Appeals of New York, Jan. 8, 1901.*)

[59 N. E. Rep. 91.]

Construction of Sewer—Negligence of City.—Defendant, in constructing a sewer 3 miles long and 10 feet in diameter, and 35 feet beneath the surface, employed the trench method, by digging an open trench and building in the sewer. This method had been in use for years, and was the one generally followed in constructing sewers of that character, and both the plan of the work and the route of the sewer were selected by competent engineers after a long and careful study of the subject. Two experts for plaintiff in an action for injuries to abutting property resulting from building the sewer testified that the pilot system would have been safer, but that they had never seen it in use, and that it was of recent origin. No expert expressly condemned the method adopted, and a large majority of them preferred it. *Held* not sufficient to sustain the claim that the city was negligent in adopting an unsafe plan for the work, or in selecting an improper route for the sewer.

Contract for Improvement—Independent Contractors—Liability for Injuries.*—A city employed M. & Co. to construct a sewer, the contractors to furnish the material and workmen, and the men, machinery, and details to be under his control, while the city reserved the right to discharge incompetent workmen, but had no power to fill their places with men of its own selection. The work was to be done in accordance with specifications, and under the direction and to the satisfaction of certain city officers. *Held*, that M. & Co. were independent contractors, and hence the city was not liable for injuries resulting to abutting property owners from the contractors' negligence.

Appeal from supreme court, appellate division, Second department.

Action by Mary T. Uppington against the city of New York. From a judgment of the appellate division (60 N. Y. Supp. 1150) affirming a judgment in favor of defendant, plaintiff appeals. Affirmed.

Case Stated.

This action was brought by an abutting owner upon Greene avenue, in the borough of Brooklyn, to recover damages alleged to have been sustained from injuries to her house through the construction of a sewer by means of an open trench in said street. The sewer is known as a "relief sewer," laid to carry off surface water which after heavy storms flooded a portion of the city quite remote

*See notes at end of case.

from the plaintiff's property. Upon the trial there was evidence tending to show that the trench dug for the purpose of laying the sewer caused the ground to settle in front of the plaintiff's premises and injured her house to the extent of $1,500, as claimed by her, although the jury upon the first trial assessed her damages at the sum of $500. The verdict was set aside, however, upon appeal, and a new trial was granted, on the ground that she had not made out a cause of action. Upon the second trial, which is now under review, the same facts appeared, and at the close of all the evidence the trial judge directed a verdict for the defendant. Greene avenue is a public street 70 feet wide, and 35 feet from curb to curb. It is well built up with dwellings upon either side, ranging from 2½ to 3½ stories in height. The most of the buildings stand back 10 feet from the line of the street, while some, including that of the plaintiff, stand upon the line. The soil under the street is compact gravel and sand, and contains bowlders, some of which are 4 or 5 feet in diameter. The depth of the excavation in front of the plaintiff's premises was about 35 feet, the width at the top 18 feet, and the sewer was 10 feet in diameter, when measured inside. The entire length of the sewer, including branches, was more than 3 miles, but for the most of that distance the diameter ranged from 5 feet to 12 inches, although for a part of the way it was from 12 to 15 feet. The work was let to the firm of James J. Moran & Co., who agreed to construct the sewer according to the specifications, and furnish all the materials and labor required, for a given sum per running foot, varying with the size. The method of construction provided by the specifications was through an open trench, to "be opened one foot wider on each side than the exterior diameter of the sewer," which was to be 12 feet. The sides of the excavation were to be "supported with suitable plank and shoring whenever necessary." The contractors were required at their own expense to "shore up, protect, restore, and make good, as may be necessary, all buildings, walls, fences, or other properties which may be disturbed or injured during the progress of the work"; "to do everything necessary to protect, support, and sustain the buildings on both sides of the street"; and were to "be held responsible for all damages which may happen to neighboring properties." A sufficient quantity of timber and plank was to be kept constantly upon the ground and used "as required for bracing and sheathing the sides of the excavation." Before breaking ground written notice of at least 24 hours was to be given to all persons whose interests might be affected by operations under the contract. The contractors were to promptly remove the surplus earth, relay cross walks, replace broken stones, regrade and repave the streets to the extent required by the work, and keep the materials excavated so trimmed as to be of as little inconvenience as possible to the public and the adjoining tenants. All damages resulting to

buildings, etc., through the negligence of the contractors were to be paid by them, and they were required to give a bond to indemnify the city against all suits brought on account of injuries sustained through the construction of the work, "or by or on account of any act or omission of" the contractors or their agents. In addition to this, the city was authorized to retain enough money otherwise going to the contractors to make good all losses to third persons. The city engineer was to "have the right to regulate the excavation," and not "more than 400 feet of trench" was to be opened at one time without his permission, while the commissioner of city works was authorized to "change at his discretion the amount of all the various kinds of work and materials and structures." The contractors were required to observe all the ordinances of the common council in relation to obstructing the streets, and "in all cases of rock-blasting the blast" was "to be carefully covered with heavy timber, according to the ordinances of the common council" relating to the subject, "which ordinances shall be strictly observed." If any person employed by the contractor should "appear to the engineer to be incompetent or disorderly," he was to be discharged, and not employed again without permission. The engineer, with the consent of the commissioner, had power "to vary, extend, or diminish the quantity of work during its progress without vitiating the contract." It was also provided that "all explanations and directions necessary to the carrying out and completing satisfactorily the different descriptions of work contemplated and provided for under this contract will be given by said engineer." The city had the right to inspect the work and materials to see that they corresponded with the specifications. Any materials or implements brought upon the ground which the engineer "should deem to be of improper description or improper to be used in the work" were to be removed forthwith. The contractors were to have charge of and be responsible for the entire line of work until its completion and acceptance, and were not to be paid for any part thereof until the whole sewer was finished. The specifications contained many provisions relating to details of the work that are usually found in municipal contracts for the building of sewers. The plaintiff's lot, as described in her deed, begins at a fixed point "on the southerly side of Greene avenue," and the third course runs "to the southerly side of Greene avenue, and thence" by the fourth course "westerly along Greene avenue to the place of beginning." The house on said lot consisted of three stories and a basement, and cost $9,300. Further facts are stated in the opinion.

James Troy and George W. Wingate, for appellants.

John Whalen, Corp. Counsel (William J. Carr and R. Percy Chittenden, of counsel), for respondent.

Vann, J. (after stating the facts). When a municipal corporation has general authority by statute to make a public im-

provement in a public street which does not involve direct encroachment upon private property, it is not liable for consequential damages unless they are caused by negligence, misconduct, or want of skill on the part of its servants or agents. Atwater v. Trustees, 124 N. Y. 602, 27 N. E. 385; Radcliff's Ex'rs v. Mayor, etc., 4 N. Y. 195; Northern Transp. Co. v. City of Chicago, 99 U. S. 635, 25 L. Ed. 336; 2 Dill. Mun. Corp. § 1029; Shear. & R. Neg. § 272. In such cases the corporation is the agent of the state, and acts done in the proper exercise of governmental powers do not make such agent liable at common law, even if they indirectly affect, but do not directly invade, private property. If the work is unlawful, the injury willful, or the damages are owing to the failure of the proper authorities to exercise due care or skill, there is no exemption from liability, even when the undertaking is wholly for the benefit of the public. The relief sewer which is the subject of this controversy was lawful, because it was built wholly in a public street, without encroaching upon private property, and was duly authorized by statute. Such damages as were inflicted upon abutting property were an indirect result of the work, and were not caused by willful misconduct. The controlling question is whether they were owing to the omission of some municipal duty, or, in other words, whether the city, through its representatives, was guilty of negligence, which includes want of skill whenever the exercise of skill is required by law. This question, for convenience, may be resolved into the following subordinate questions: (1) Whether the defendant was negligent in selecting an improper route or adopting an improper plan for the construction of the sewer; (2) whether James J. Moran & Co. were "independent contractors," as that phrase is known in law; (3) whether said contractors, if not independent, were negligent in executing the work.

The city was not obliged, at its peril, to select the best possible route or to adopt the best possible plan, provided the route selected and the plan adopted were reasonably safe. While the statute which conferred the power did not provide that this particular sewer should be built in any particular street, it was without limitation, and hence the city had control of the method of making the improvement. The route and plan adopted promoted the interest of the public, but two experts called by the plaintiff testified, in view of what had happened, and not in anticipation of what might happen, that construction by means of a tunnel would have caused less settling of the ground and less danger to abutting property than construction by an open trench. The city employed engineers conceded to be competent, who after long and careful study of the subject, recommended the route and plan finally determined upon. That the route thus selected was a proper one, according to the evidence, does not admit of discussion. The city was bound to exercise due care

Construction of Sewer—Negligence of City.

to see that the plan decided upon was reasonably safe, but its "rights were superior to those of persons engaged in work private in character." Atwater v. Trustees, supra. The plan adopted had been in general use for years. It was carefully prepared to protect both public and private interests. The tunnel plan, while safer in most respects, is dangerous to some extent, as well as more expensive. It causes less settling of the ground and prevents interference with travel, but inspection is more difficult, and inferior work less apt to be discovered. It was not in general use, for almost all sewers in this country, at the time the plan was adopted, were laid in open cuts. "The tunnel is the exception, not the rule." There are three methods of tunneling, known as the timber, shield, and pilot systems. One of the plaintiff's experts condemned the timber method as dangerous at the place in question, and testified that the pilot system was the best, although he had never seen it in operation. The other expert sworn for the plaintiff also preferred the pilot system, but said that he had never used it, and that it was of recent origin. Even by the pilot system there are intervals of time when portions of the earth above are unsupported before the sustaining plates are put in, and, while the interval is short, subsidence of the soil may take place before the support is adjusted. Engineering conditions required the sewer to be placed about 35 feet beneath the surface of the street in front of the plaintiff's property, which left insufficient lateral pressure of the soil to prevent undue vertical pressure upon the work of excavating a tunnel. A sewer only 10 feet in diameter cannot be conveniently built by means of a tunnel, owing to the lack of room for workmen, and the city had never used that method under the circumstances named. The inconvenience of building a sewer but 10 feet wide by the tunnel method was illustrated by actual experience on the work in question, as it was necessary, for a part of the way, to tunnel under a hill 80 feet high; yet the contractor testified that he asked and obtained permission from the city authorities to make a sewer 12 feet in width, without additional charge, although the contract called for one only 10 feet wide. Even that tunnel, at that depth, caused some damage to abutting property, and it cost $58 more per running foot than where a cut was made. Furthermore, there was a sewer in actual use 12 feet below the surface of the street, which, in case of leakage, might flood the tunnel and make it dangerous to adjacent property through settling of the moist soil. The city wished to remove that sewer from the street altogether, which would have been impossible except by the trench system. The presence of bowlders in the soil made the tunnel plan less feasible than it otherwise would have been. The experience of the city was against it. No expert expressly condemned the plan adopted, and a large majority, including those of the highest standing and greatest experience, preferred it. The specifications made careful provision to

protect the property of abutting owners by shoring, sheathing, and otherwise, as well as to compel the contractors to make good any loss that might happen.

The fact that the engineers of the city expected there would be some damage to sidewalks and stoops before they adopted the plan does not show that it was defective, because some damage would have resulted from any plan. Consequential damages, more or less serious, naturally result from making extensive improvements in a public street occupied with dwellings standing upon either side. The city, however, is not liable therefor at common law, so long as they are confined to consequences that are the necessary and usual result of the proper exercise of the power to make the improvement. A change of grade may leave some houses too high and others too low, either to look well or to be conveniently used with reference to the street; yet, even if the change is such as to endanger their stability, the city is not responsible at common law, although the subject has been regulated by statute to some extent in certain cities. Radcliff's Ex'rs v. Mayor, etc., supra. As was said in Atwater v. Trustees, supra, which is an instructive case: "Serious injury to property may be occasioned by the lawful exercise of powers of public character pursuant to law, and if the work is carefully and skillfully performed the consequences may be damnum absque injuria when the legislature has provided for no compensation. In such case the protection of the owner of property not taken or appropriated, which may be subjected to hazard or injury, is in the care and skill to be observed by those engaged in the execution of the work. If they fail to do that they are liable for the consequence of such failure." We think the evidence before us, even with every permissible inference drawn in favor of the plaintiff, would not permit a jury to find that the plan of construction was not reasonably safe. While some facts bearing on the principal question were in controversy, the uncontradicted evidence, when considered in connection with those facts, assuming them to be found according to the plaintiff's theory, left no question of fact as to the reasonable safety of the plan.

Contract for Improvement—Independent Contractors—Liability for Injuries.

When a municipal corporation furnishes its own materials, and makes a public improvement through agents selected by itself, with power to discharge them at will, and to direct them as to details of the work, they are its servants, and the master who selects and controls them is liable for their negligence. They are, so to speak, the hands and arms of the city, to do its will, as the hands and arms of a man do his will. When, however, the city has power to let the work, and it enters into contract with competent contractors, doing an independent business, who agree to furnish the necessary materials and labor and make the entire improvement, according to specifications prepared in advance, for a lump sum, or

its equivalent, they are not the servants or agents of the city, but are independent contractors; and the city is not liable for their negligence, even when it reserves the right to change, inspect, and supervise to the extent necessary to produce the result intended by the contract, provided the plan is reasonably safe, the work is lawful, is not a nuisance when completed, and there is no interference therewith by municipal officers, which result in injury. Berg v. Parsons, 156 N. Y. 109, 50 N. E. 957, 41 L. R. A. 391; Engel v. Eureka Club, 137 N. Y. 100, 32 N. E. 1052; Butler v. Townsend, 126 N. Y. 105, 26 N. E. 1017; Charlock v. Freel, 125 N. Y. 357, 26 N. E. 262; Herrington v. Village of Lansingburg, 110 N. Y. 145, 17 N. E. 728; Ferguson v. Hubbell, 97 N. Y. 507; Town of Pierrepont v. Loveless, 72 N. Y. 211; Kelly v. Mayor, etc., 11 N. Y. 432; Pack v. Mayor, etc., 8 N. Y. 222; Blake v. Ferris, 5 N. Y. 48; Reedle v. Railway Co., 4 Exch. 244; Overton v. Freeman, 21 Law J. C. P. (N. S.) 52. Independence of control in employing workmen and in selecting the means of doing the work is the test usually applied by courts to determine whether the contractor is independent or not. James J. Moran & Co., as competent contractors, undertook the independent business of building the sewer in question with their own materials and their own men; for, by specific agreement, they were to furnish both. They represented the will of the defendant as to the result of the work, but not as to the means of doing it. The men, the machinery, and the details were all under their control. The city could not employ workmen for them, nor direct the workmen employed by them. It could not select the tools and appliances to be used, nor require them to be used in any particular way or at any particular time. The will of the contractors, not of the city, controlled in these respects. While certain municipal officers could require the contractors to discharge incompetent workmen, that did not make the workmen not discharged the servants of the city, nor empower it to fill the places of those discharged with men of its own selection. Stipulations to secure faithful compliance with the specifications on the part of the contractors do not make them servants of the city, as was held in Kelly v. Mayor, etc., supra, where the contract contained the following clause: "The whole work to be done under the direction and to the entire satisfaction of the commissioner of repairs and supplies, the superintendent of roads, and the surveyor having charge of the work." The contractor in that case also "agreed to do the work, to take all necessary precautions for the prevention of accidents or injuries to persons or property, and to indemnify the corporation against all loss or damage by reason of any neglect or unskillfulness in its performance." The court said: "The clause in question clearly gave to the corporation no power to control the contractor in the choice of his servants. That he might make his own selection of workmen will not be denied. This right of selec-

tion lies at the foundation of the responsibility of a master or principal for the acts of his servant or agent. * * * As a general rule, certainly, no one can be held responsible as principal who has not the right to choose the agent from whose act the injury flows. * * * The object of the clause relied upon was not to give to the commissioner of repairs and the other officer named the right to interfere with the workmen and direct them in detail how they should proceed, but to enable them to see that every portion of the work was satisfactorily completed. It authorized them to prescribe what was to be done, but not how it was to be done, nor who should do it." So, in Pack v. Mayor, etc., supra, the contract provided that the work was to be done according to certain specifications, and the contractor also agreed to "conform the work to such further directions as should be given by the street commissioner and one of the city surveyors"; yet it was held that this was "nothing more than a stipulation for a change of the specification of the work, as stated in the contract, at fixed prices provided therein. It does not, as the court below held, make Riley the immediate servant of the defendants, nor give to them any control over him as to the manner or otherwise in which he should conduct the blasting." See, also, Charlock v. Freel, 125 N. Y. 357, 26 N. E. 262, where the city reserved the right to "vary, extend, or diminish the quantity of work during its progress," and authorized the engineer to fix the price of all work not included in the contract. As was said by the learned appellate division, the "supervisory powers related to the character of the work performed for the then city of Brooklyn, and not to the relations of the contractors with third persons." Those relations were not interfered with by the city, which, however, made careful provision for the protection of abutting property by shoring it up, sheathing the trench, and the like, but leaving to the contractors full control of the means and method of doing it. While the contract provided that it should be done, it did not provide how it should be done. "To make the city liable, it must have the power to direct and control the manner of performing the very work in which the carelessness occurred." Vogel v. Mayor, etc., 92 N. Y. 10, 18. James J. Moran & Co. were not servants employed in the business of a master, and subject to his control as to all parts of the work, but were independent contractors, engaged in making an entire improvement, free from control as to the manner of performance, although subject to instructions as to results. The plan was reasonably safe, the work was lawful, was not interfered with by the city to the injury of the plaintiff, and was not a nuisance when performed. We think the city was liable neither for the negligence of the contractors nor that of their agents or servants. The contractors were, of course, liable for their own negligence, but the conclusion already reached makes it unnecessary

Notes

to consider that subject upon this appeal. The judgment should be affirmed, with costs.

Parker, C. J., and O'Brien, Bartlett, Haight, Martin, and Landon, JJ., concur.

Judgment affirmed.

NOTES.

Independent Contractor—Liability of City for Acts of.—In City of Indianapolis *v.* Marold (Ind.), 58 N. E. Rep. 512, the court said: "It is well settled by the greater weight of authorities that, because of its duty to the public, a city or town, when having work done upon its streets or bridges, although by a contractor, is bound to see that such precautions are used while the work is in progress as are reasonably necessary to protect travel. No matter what kind of contract the city may make, nor with whom, it still remains charged with the care and control of the street in which the improvement, change, or repair is being made, and it cannot throw off its duty and the responsibilities through which that duty is to be enforced." Storrs *v.* City of Utica, 17 N. Y. 104; Brusso *v.* City of Buffalo, 90 N. Y. 679; City of Circleville *v.* Neuding, 41 Ohio St. 465; City of St. Paul *v.* Seitz, 3 Minn. 297 (Gil. 205); Brooks *v.* Inhabitants of Somerville, 106 Mass. 271; Groves *v.* City of Rochester, 39 Hun (N. Y.) 5; Wilson *v.* City of Wheeling, 19 W. Va. 323; City of Jacksonville *v.* Drew, 19 Fla. 106, 45 Am. Rep. 5; Dressel *v.* City of Kingston, 32 Hun (N. Y.) 533; Welsh *v.* City of St. Louis, 73 Mo. 71; Hawxhurst *v.* Mayor, etc., of New York, 43 Hun (N. Y.) 588; Russell *v.* Inhabitants of Columbia, 74 Mo. 480, 41 Am. Rep. 325. And in such cases notice to the municipality of the absence of proper precautions or guards would not be necessary. Brusso *v.* City of Buffalo, *supra*; Brooks *v.* Inhabitants of Somerville, *supra*; City of Ironton *v.* Kelley, 38 Ohio St. 50; Groves *v.* City of Rochester, *supra*; Board of Com'rs *v.* Pearson, 120 Ind. 426, 22 N. E. Rep. 134; Louisville *v.* Shanahaw (Ky.), 56 S. W. Rep. 808; Carle *v.* City of Desoto (Mo.), 57 S. W. Rep. 113; City of Corsicana *v.* Tobin (Tex.), 57 S. W. Rep. 319.

In Dooley *v.* Sullivan, 112 Ind. 451, 14 N. E. Rep. 451, the court, in substance, said that if the contractor's work was regarded as independent employment, then to fasten liability for injury upon the town it must be shown that the work was dangerous *per se* or that the town authorities had notice of the danger or were negligent in not discovering it. Ryan *v.* Currow, 64 Ind. 345; Bluffton *v.* Mathews, 92 Ind. 213; City *v.* Wilks, 86 Ind. 414; City *v.* Baker, 103 Ind. 41, 2 N. E. Rep. 236; Storrs *v.* Utica, 17 N. Y. 104; Lockwood *v.* New York, 2 Hilbon (N. Y.) 66; Springfield *v.* La Clane, 49 Ill. 476; Savannah *v.* Waldner, 49 Ga. 316; Blake *v.* St. Louis, 40 Mo. 569; Murphey *v.* Lowell, 124 Mass. 564; Harrisburg *v.* Saylor, 87 Pa. St. 216; Whitney *v.* Clifford, 46 Wis. 138, 19 N. W. Rep. 835; Carman *v.* Steub. & Ind. R. Co., 4 Ohio St. 399; Wilson *v.* Wheeling, 19 W. Va. 324; Logansport *v.* Dick, 70 Ind. 65, 36 Am. Rep. 166; City of Circleville *v.* Neuding, 41 Ohio St. 465; Houston *v.* Isaaks, 68 Tex. 116, 3 S. W. Rep. 693; Joliet *v.* Seward, 86 Ill. 402; Mayor of Baltimore *v.* O'Donnel, 53 Md. 110, 36 Am. Rep. 395; Mayor of Birmingham *v.* McCary, 84 Ala. 469, 4 So. Rep. 639; Nashville *v.* Brown, 9 Heisk. (Tenn.) 1; St. Paul *v.* Seitz, 3 Minn. 297.

Notes

Where a subway in a street is the direct cause of destruction of a house which abutted on the street, the city cannot escape liability for such injury on the ground that it was caused by the negligence of contractors doing the work. Marsh *v.* Philadelphia, 8 Pa. Dist. R. 340.

Same—Liability Where Injury Is Caused by Defect Collateral to Contract Work.—Where a contract is let by a city for work and injury is caused by an obstruction or defect wholly collateral to the contract work, and entirely the result of the contractor's default unless the city gave its consent or had knowledge of such obstruction or defect, or negligently failed to discover it, it will not be held liable for such injury.

England.—Gray *v.* Pullen, 32 L. J. Rep. (N. S.) Q. B. 169; Reedie *v.* London & N. W. Ry. Co., 4 Exch. 224.

United States.—Robbins *v.* Chicago, 4 Wall. 657; St. Paul Water Co. *v.* Ware, 16 Wall. 566.

Illinois.—Seammon *v.* Chicago, 25 Ill. 424; Chicago *v.* Dermody, 61 Ill. 431; Chicago *v.* Jouey, 60 Ill. 383; Springfield *v.* La Claire, 49 Ill. 476.

Indiana.—Cummins *v.* Seymour, 79 Ind. 491, 41 Am. Rep. 618.

Massachusetts.—Hilliard *v.* Richardson, 3 Gray 349; Lowell *v.* Boston & L. R. R. Corp., 23 Pick. 24.

Michigan.—Detroit *v.* Corey, 9 Mich. 165.

Minnesota.—St. Paul *v.* Seitz, 3 Minn. 597; Fay *v.* Davidson, 13 Minn. 523.

Missouri.—Berry *v.* St. Louis, 17 Mo. 121; Blumb *v.* Kansas City, 84 Mo. 112, 54 Am. Rep. 87.

Nebraska.—Palmer *v.* Lincoln, 5 Neb. 136.

New Hampshire.—Stone *v.* Cheshire R. R. Corp., 19 N. H. 427; Wright *v.* Holbrook, 52 N. H. 120.

New Jersey.—Cuff *v.* Newark, 35 N. J. L. 17, 10 Am. Rep. 205.

New York.—Blake *v.* Ferris, 5 N. Y. 48; King *v.* New York Cent. & H. R. R. Co., 66 N. Y. 181; Storrs *v.* Utica, 17 N. Y. 104; Pack *v.* New York, 8 N. Y. 222; Kelly *v.* New York, 11 N. Y. 432; Herrington *v.* Lansingburgh, 110 N. Y. 145, 17 N. E. Rep. 728; McCafferty *v.* R. Co., 61 N. Y. 178; Goudier *v.* Cormack, 2 E. D. Smith (N. Y.) 254; Hay *v.* Cohoes Co., 2 N. Y. 159; Uppington *v.* New York, 58 N. Y. Supp. 533, 14 App. Div. 370.

Ohio.—Cincinnati *v.* Stone, 5 Ohio St. 38; Clark *v.* Fry, 8 Ohio St. 358; Tiffin *v.* McComack, 34 Ohio St. 638; Carman *v.* Steub. & Ind. R. Co., 4 Ohio St. 369.

Oregon.—McAllister *v.* City of Albany, 18 Ore. 426, 23 Pac. Rep. 845.

Pennsylvania.—Erie *v.* Caulkins, 85 Pa. St. 247; Painter *v.* Pittsburg, 46 Pa. St. 213; Harrison *v.* Collins, 86 Pa. St. 153; Susquehanna Depot Bar *v.* Simmons, 112 Pa. St. 384, 5 Atl. Rep. 434; Edmondson *v.* Pittsburg, etc., R. Co., 111 Pa. St. 316, 2 Atl. Rep. 404; Allen *v.* Willard, 57 Pa. St. 374.

Tennessee.—Nashville *v.* Brown, 9 Heisk. 1.

Same—Effect of Payment by the Day.—Although a contractor is paid daily for his work, still the mere fact of such payment, is not necessarily destructible to the independent character of his employment. Corbin *v.* American Mills, 27 Conn. 274; Forsyth *v.* Hooper, 11 Allen (Mass.) 419.

SCHROEDER

v.

CITY OF JOLIET.

(*Supreme Court of Illinois, Feb. 20, 1901.*)

[59 N. E. Rep. 550.]

Change of Grade—Lateral Support—Measure of Damages.*—Under Const. art. 2, § 13, providing that private property shall not be taken or damaged for public use without just compensation, an owner of property deprived of its lateral support by the city cutting down the street on which it was located can recover only the difference in the market value of the property before and after the improvement, considering the benefits of the improvement.

Appeal from appellate court, Second district.

Action by Abbie C. Schroeder against the city of Joliet to recover damages for the removal of the lateral support to her property. From a judgment of the appellate court reversing a judgment of the trial court in favor of the plaintiff, the plaintiff appeals. Affirmed.

J. L. O'Donnell, for appellant.

R. J. Barr, for appellee.

Cartwright, J. This case was tried in the circuit court of Will county upon the amended declaration of appellant and a plea of the general issue thereto by appellee, and resulted in a verdict and judgment for $500 in favor of appellant. By said amended declaration the plaintiff alleged that she owned lots 5 and 6, in block 14 in West Joliet, in the city of Joliet, fronting upon Hickory, Broadway, and Exchange streets; that the city improved said streets by cutting them down and excavating them, so as to deprive the said lots of their lateral support; that said lots were thereby rendered insecure, and the soil, fences, walls, and other improvements were caused to fall into the excavation for want of said lateral support, and that she thereby sustained damages which she sought to recover. On the trial, plaintiff proved that the city had cut down Exchange street opposite her property, and that some of the earth had fallen, and more would fall; and she introduced the opinions of witnesses as to how much of the lots would eventually fall into the street, and what damage and injury were occasioned to the lots thereby. She contended that the cutting down of the street adjoining her property abutting thereon, and thereby removing the lateral support, was an actual taking of said

*See notes at end of case.

property, and that she was entitled to compensation in money for the property so taken, regardless of benefits resulting from the improvement. The defendant did not deny that it had cut down the street and removed the lateral support from the adjoining property, nor that plaintiff was entitled to recover damages if her property was damaged and lessened in value by the improvement. The only question raised was whether the measure of damages was the difference in market value of the lots before and after the improvement, or whether the defendant must pay damages although the improvement might have increased the value of the lots. The court held the rule contended for by plaintiff to be the correct one, and that the defendant must pay for the injury to the lots in consequence of its act by removing the lateral support, regardless of the effect of the improvement upon the lots. The defendant sought to prove that in consequence of the improvement the market value of plaintiff's property was from $2,000 to $5,000 more after the cutting down and improvement of the streets than before. The court sustained objections to evidence of that character, and followed the same rule in giving and refusing instructions. The defendant asked the court to give instructions that, if the property was benefited by the improvement, and was worth more afterwards than before, plaintiff could not recover. The instructions were refused, and instructions were given upon the theory that, although there was no damage to plaintiff's property from the improvement, and it was benefited thereby, yet the benefit should not be taken into account. The defendant removed the cause to the appellate court for the Second district, and that court sustained the errors assigned, and reversed the judgment for such errors, and remanded the cause to the circuit court for another trial. Plaintiff, who was appellee in the appellate court, thereupon moved that court to vacate and set aside the order remanding the cause to the circuit court, to make the judgment one of reversal only, and to grant a certificate of importance and an appeal to this court. Her motion was allowed, and the remanding order stricken out, leaving the judgment of the appellate court a final judgment reversing the judgment of the circuit court, and ending the case. The appellate court then granted a certificate of importance, as requested, and allowed an appeal to this court. There was no finding of facts by the appellate court, and the reversal was for errors of law which might have been corrected upon another trial. The judgment, as first entered, gave plaintiff the right of another trial. The appellate court, by its opinion, fixed the rules of law for such trial as defendant had claimed the law to be in the trial court. Plaintiff did not wish to try her case again if the appellate court was right, and the reversal for error was proper. She declined to try it again under the rules fixed, and, as she requested that the case should not be remanded, the only question here is whether the appellate court was right in sustaining the errors assigned and reversing the judgment.

The constitution provides (article 2, § 13) that "private property shall not be taken or damaged for public use without just compensation." The rule has long been settled that, if property is actually taken and applied to a public use, this provision of the constitution requires that it shall be paid for in money, regardless of benefits to other land of the same owner of which he is not deprived. Carpenter v. Jennings, 77 Ill. 250; Chaplin v. Commissioners, 129 Ill. 651, 22 N. E. 484. Where property is not actually taken by the public for its use, but the question is whether it has been damaged for public use, the ordinary rule for the determination of that question is applied; and, if the market value of the property is not decreased, there is no damage, and there can be no recovery. In this case it is alleged that there is a damage to appellant's property by depriving it of lateral support. There is, incident to land in its natural condition, a right of support from the adjoining land, and every owner is entitled to have his soil in its natural state sustained, when necessary by, the lateral support of the adjacent soil. City of Quincy v. Jones, 76 Ill. 231. This right of lateral support is one which an owner enjoys in connection with his property, and, if he sustains damages by its withdrawal by the adjoining owner, he is entitled to be compensated. Where there is an injury to a right of that character, there may be a recovery for the depreciation in value by reason of being deprived of the right. Rigney v. City of Chicago, 102 Ill. 64. If such support is removed by a city in making an excavation, the city is liable for the damages resulting from its act, if there be any. The measure of damages is the diminution in value of the property by reason of the act of the city. 3 Suth. Dam. 417. The law will protect an owner of property from aggression on the part of the city, but if, upon a consideration of the effects of the improvement upon the property, there is no damage, neither the constitution nor the law authorizes a recovery. The claim that this is deducting benefits from damages, as contended by counsel, was refuted in Page v. Railway Co., 70 Ill. 324, as follows (page 328): "A partial effect only is not to be considered, but the whole effect; and the effect not upon any selected part of the tract, but upon the whole tract. This is not deducting benefits or advantages from damages, but it is ascertaining whether there be damages or not. It is but the estimation of damages, and seems the only fair and just mode of estimating them." It seems clear that no part of plaintiff's lots was taken for public use, within the meaning of the constitution. The city took away its own adjoining property, and some of the dirt and stones of plaintiff's lots have fallen by their own weight for want of lateral support, and more will fall. She still holds the title and possession of her lots, which have not been interfered with; and the evidence which she produced was not directed to the value of dirt and stones which had

fallen away as property taken by the defendant for public use, but to the injurious consequences to the whole of the lots. In estimating the alleged injury to the whole property, the effect of the improvement upon its value was excluded by the court, and the jury were instructed to take no account of the resulting benefits. There might be an injury to plaintiff's property by reason of its being rendered less available for use, and its market value might be lessened or destroyed by the improvement; but, if there is no depreciation in market value, and no damage when the entire improvement is taken into account, she is not entitled to recover.

Some cases are cited where it has been held that an owner is entitled to compensation for an injury to his property by excavating a street, but none of them announces any other rule as a measure of damages than depreciation in value. The constitution of 1848 made no special provision for property which was merely damaged, but provided that property should not be taken or applied to public use without just compensation. In Nevins v. City of Peoria, 41 Ill. 502, it was held that said constitution was designed to prevent such injuries as the turning off a stream of mud and water upon private premises in the improvement of a public street, but the court said that it did not consider the question on what basis the damages should be assessed. There are numerous cases following that one, but counsel have not found any which approves a different rule of damages than to take account of the whole effect upon the property of the act of the city. The present constitution makes a distinction between property which is taken and that which is merely damaged, and, in order to determine whether property is damaged or not, all the consequences of the improvement must be taken into account. The rule adopted by the circuit court was wrong, and the appellate court was right in reversing the judgment. The judgment of the appellate court is affirmed. Judgment affirmed.

NOTES.

Change of Grade—Non-Liability of City.—When a municipality, under due authority repairs and regrades its streets, without trespassing upon any adjacent premises, it will not be held liable for any consequential damages merely, unless such liability is imposed by statute or its charter.

United States.—Goszler *v.* Georgetown, 19 U. S. (6 Wheat.) 593; Transportation Co. *v.* Chicago, 99 U. S. 635; Smith *v.* Washington, 20 How. (U. S.) 135.

Arkansas.—Simmons *v.* Camden, 26 Ark. 276.

California.—Shaw *v.* Crocker, 42 Cal. 435.

Connecticut.—Hooker *v.* New Haven, etc., Co., 14 Conn. 146; Bradley *v.* Railroad Co., 21 Conn. 294; Clark *v.* Saybrook, 21 Conn. 313; Skinner *v.* Bridge Co., 29 Conn. 523; Burritt *v.* New Haven, 42 Conn. 174; Fellowes *v.* New Haven, 44 Conn. 240.

Notes

Florida.—Dorman *v.* Jacksonville, 13 Fla. 538.

Georgia.—Markham *v.* Mayor, etc., 23 Ga. 402; Rome *v.* Omberg, 28 Ga. 46; Roll *v.* Augusta, 34 Ga. 326; Mitchell *v.* Rome, 49 Ga. 19; Fuller *v.* Atlanta, 66 Ga. 80.

Illinois.—Roberts *v.* Chicago, 26 Ill. 249; Murphy *v.* Chicago, 29 Ill. 279; Nevins *v.* Peoria, 41 Ill. 502; Quincy *v.* Jones, 76 Ill. 231; Shawneetown *v.* Mason, 82 Ill. 337.

Indiana.—Snyder *v.* Rockport, 6 Ind. 237; La Fayette *v.* Spencer, 14 Ind. 399; Macy *v.* Indianapolis, 17 Ind. 267; La Fayette *v.* Bush, 19 Ind. 329; Vincennes *v.* Richards, 23 Ind. 381; La Fayette *v.* Fowler, 34 Ind. 140; Delphi *v.* Evans, 36 Ind. 90; Terre Haute *v.* Turner, 39 Ind. 522.

Iowa.—Creal *v.* Keokuk, 4 Greene 47; Cotes *v.* Davenport, 9 Iowa 227; Cole *v.* Muscatine, 14 Iowa 296; Ellis *v.* Iowa City, 29 Iowa 229; Russell *v.* Burlington, 30 Iowa 262; Burlington *v.* Gilbert, 31 Iowa 356.

Kentucky.—Keasy *v.* Louisville, 4 Dana 154; Newport, etc., Bridge Co. *v.* Foote, 9 Bush 264.

Louisiana.—Reynolds *v.* Shreveport, 13 La. Ann. 426.

Maine.—Mason *v.* Kennebec, etc., R. Co., 31 Me. 215; Hovey *v.* Mayo, 43 Me. 322; Kimball *v.* City of Bath, 38 Me. 219.

Massachusetts.—Callender *v.* Marsh, 1 Pick. 418; Griggs *v.* Foote, 4 Allen 195; Brown *v.* Lowell, 8 Metc. 172; Benjamin *v.* Wheeler, 8 Gray 409.

Michigan.—Pontiac *v.* Carter, 32 Mich. 164.

Minnesota.—Lee *v.* Minneapolis, 12 Minn. 13; Karst *v.* St. Paul, etc., R. Co., 22 Minn. 118; Aldew *v.* Minneapolis, 24 Minn. 254.

Mississippi.—White *v.* Yazoo City, 27 Miss. 357.

Missouri.—St. Louis *v.* Gurno, 12 Mo. 414; Taylor *v.* St. Louis, 14 Mo. 20; Hoffman *v.* St. Louis, 15 Mo. 651; Schattener *v.* Kansas City, 53 Mo. 162; Wegmann *v.* Jefferson, 61 Mo. 55; Thompson *v.* Boonville, 61 Mo. 282.

Nebraska.—Nebraska City *v.* Lampkin, 6 Neb. 27.

New Jersey.—Quinn *v.* Paterson, 27 N. J. L. (3 Dutch.) 35; Trenton, etc., Co. *v.* Raff, 36 N. J. L. 335; Pluno *v.* Morris Canal Co., 2 Stockt. 256.

New York.—Radcliff's Ex'rs *v.* Mayor, 4 N. Y. 195; Waddell *v.* Mayo, 8 Barb. 95; Miller *v.* Brooklyn, 32 N. Y. 389; St. Peter *v.* Denison, 58 N. Y. 416; People *v.* Green, 64 N. Y. 606.

Ohio.—In this state consequential damages can be recovered. Goodloe *v.* Cincinnati, 4 Ohio 500; Crawford *v.* Village of Delaware, 7 Ohio St. 459; Scovil *v.* Geddings, 4 Ohio 211; McCombs *v.* Akron, 15 Ohio 474; Dodson *v.* Cincinnati, 34 Ohio St. 276.

Pennsylvania.—Green *v.* Reading, 9 Watts (Pa.) 382; Reading *v.* Keppleman, 61 Pa. St. 233; Charlton *v.* Allegheny City, 1 Grant's Cas. 208; Comm'rs *v.* Wood, 10 Pa. St. 93; O'Conner *v.* Pittsburg, 18 Pa. St. 187; *In re* Ridge St., 29 Pa. St. 391; Carr *v.* Northern Liberties, 35 Pa. St. 324.

Rhode Island.—Simmons *v.* Providence, 12 R. I. 8.

Tennessee.—Humes *v.* Mayor, 1 Humph. (Tenn.) 403.

Virginia.—Kehrer *v.* Richmond, 81 Va. 745.

Wisconsin.—Goodall *v.* Milwaukee, 5 Wis. 32; Weeks *v.* Milwaukee, 10 Wis. 242; Pearce *v.* Milwaukee, 18 Wis. 428; Tyson *v.* Milwaukee, 50 Wis. 78.

Stretch *v.* Village of Cassopolis

Same—Right of Lateral Support.—The great weight of authority in this country is to the effect that an abutting owner has no common-law right of support against a municipality where the city under proper authority proceeds to grade its streets, and such right cannot be obtained by prescription or grant. Taylor *v.* St. Louis, 14 Mo. 20; St. Louis *v.* Gurno, 12 Mo. 414; Pontiac *v.* Carter, 32 Mich. 164; Rome *v.* Omberg, 28 Ga. 46; Quincy *v.* Jones, 76 Ill. 231; Transportation Co. *v.* Chicago, 99 U. S. 635; Mitchell *v.* Rome, 49 Ga. 19; Roll *v.* Augusta, 34 Ga. 326; Meares *v.* Wilmington, 9 Ired. (N. Car.) 73; Chambers *v.* Satterlee, 40 Cal. 497; Crossett *v.* Janesville, 28 Wis. 420; Akron *v.* Chamberlain Co., Ohio St. 328; Dodson *v.* Cincinnati, 34 Ohio St. 276; Dyer *v.* St. Paul, 27 Minn. 457; Armstrong *v.* St. Paul, 30 Minn. 299; Hall *v.* Bristol, L. R., 2 C. P. 322; Wyatt *v.* Harrison, 3 Barn. & Ad. 871; Lasala *v.* Holbrook, 4 Paige (N. Y.) 169; Wright *v.* Wilmington, 92 N. Car. 156; Cole *v.* Muscatine, 14 Iowa 296; Thompson *v.* Boonville, 61 Mo. 282; O'Connor *v.* Pittsburg, 18 Pa. St. 187; O'Brien *v.* Philadelphia, 150 Pa. St. 589, 24 Atl. Rep. 1047; Stearns *v.* Richmond, 88 Va. 992, 14 S. E. Rep. 847; Reardon *v.* San Francisco, 66 Cal. 492, 6 Pac. Rep. 317.

Even where a landslide is caused by excavations in grading a street for public use, injury caused by such landslides are consequential damages and no recovery can be had against the city. Fellowes *v.* New Haven, 44 Conn. 240; Quincy *v.* Jones, 76 Ill. 231; Rome *v.* Omberg, 28 Ga. 46.

Whether or not the grade established is the best one or whether less damage would have been done by a different grade will not be inquired into by the courts. Roberts *v.* Chicago, 26 Ill. 249; Reynolds *v.* Shreveport, 13 La. Ann. 426; Snyder *v.* Rockport, 6 Ind. 237.

Statutory Provision.—Where by statute of Iowa certain steps must be taken before a graduation is commenced, unless the city complies with the provisions of such statute an action will lie against it for damages caused by the work. Dore *v.* Milwaukee, 42 Wis. 108; Noyes *v.* Mason City, 53 Iowa 418, 5 N. W. Rep. 593; Hempstead *v.* Des Moines, 63 Iowa 36, 18 N. W. Rep. 676. See also, Bristol, etc., Co. *v.* City of Bristol, 2 Mun. Corp. Cas. 548, and *notes*.

As to measure of damages for injury to property, see New Haven Steam Sawmill Co. *v.* City of New Haven, 3 Mun. Corp. Cas. 65, and *notes*.

STRETCH

v.

VILLAGE OF CASSOPOLIS.

(*Supreme Court of Michigan, Nov. 13, 1900.*)

[84 N. W. Rep. 51.]

Removal of Shade Trees from Street—Notice to Abutting Owner.*—Damages may be recovered against a municipal corporation for cutting down and removing shade trees standing within a street, and which

*See notes at end of case.

were planted and maintained by the abutting owner who owns the fee to the center of the street, if such removal was without previous notice to the abutting owner to remove the trees, as he was entitled to an opportunity to remove and transplant them.

Error to circuit court, Cass county; Orville W. Coolidge, Judge.

Action by Edith Stretch against the village of Cassopolis. From a judgment for the plaintiff, defendant brings error. Affirmed.

M. L. Howell, for appellant.

Coy W. Hendryx and Harsen D. Smith, for appellee.

Montgomery, C. J. The sole question which this record presents is whether a village, acting under the general incorporation act (Comp. Laws, c. 87), may cut down and remove shade trees standing within the highway, and which have been planted and maintained by the abutting owner who owns to the center of the street, when such removal is without previous notice to the abutting owner to remove the trees. There is no question but that the abutting owner has the title to shade trees adjoining his premises. Cooley, Torts, 318, 372; Clark v. Dasso, 34 Mich. 86; Rogers v. Randall, 29 Mich. 41; People v. Foss, 80 Mich. 559, 45 N. W. 480. It is equally well settled, and is conceded by the learned counsel for the plaintiff, that the municipality may, when the public necessities appear to them to call for such action, require such shade trees to be removed. The question is whether, as preliminary to their removal by the public authorities, the owner should have notice of the fact that the public necessity requires the removal of the trees, and be given the opportunity to himself transplant them or remove them. The case of Clark v. Dasso, supra, answers this question in the following language: "It is to be remembered that the trees are the property of the adjacent owner, who cannot lawfully be deprived of any species of property in the summary mode which was adopted in this case. If the trees must be removed, he may prefer to take them as living trees, and transplant them elsewhere, perhaps in suitable localities in the street; and he should not be compelled to cut them down when removal is preferred." We are satisfied that this view applies with as much force in the present case as in Clark v. Dasso. No other view is consistent with ownership of the trees by the adjacent owner. True, this title is subservient to the public right, but the public right may well be exercised in a manner not to entail entire loss of property upon the owner. It may be true that the language quoted is dictum, but such has been understood to be the law for many years, and we discover nothing in the rule which imposes on the public authorities any great burden. The case of Wyant v. Telephone Co. is not inconsistent with this holding.

In that case, which may be found at 81 N. W. 928, 47 L. R. A. 497, notice to the owner would furnish no opportunity to avoid the cutting of limbs. Whatever damage a tree might sustain by such cutting could not be obviated by the owner. Therefore notice to the owner would serve no purpose. In case of the destruction of the tree an entirely different consideration obtains. The owner who has notice of the public requirements is in a position to protect himself in a large part from damages. So clearly is this a valuable right that it has been held that a duty rests on the owner to protect himself from unnecessary damage: as in Commissioners v. Beckwith, 10 Kan. 603, where in a condemnation case the owner of a hedge sought allowance for the value of it, it was held that the allowance should be limited to the value of the hedge and its decreased value by reason of the transplanting. It is contended that the plaintiff in this case did not suffer because of the failure to give notice, because she testified that, if she had had notice, the trees would not have been removed. Whether the plaintiff meant by this that she would have taken steps to prevent their removal or that she herself would not have removed them and allowed the village authorities to do so is not quite clear, but it does appear that she was not given the opportunity to decide the question. The removal was, therefore, an invasion of her legal rights, and the judgment for the damages sustained is affirmed.

Moore, Long, and Grant, JJ., concurred with Montgomery, C. J.

Hooker, J. I concur in the opinion that the village is liable upon the ground that the agents of the village converted the trees to the use of the village after they were cut, as was substantially true in Clark v. Dasso, 34 Mich. 86. I am of the opinion that not only has the village authority to remove trees when necessity requires it for highway purposes, but that it does not become a trespasser by so doing, so long as it does not do unnecessary damage to the owner either by greater injury to the trees than is necessary, or by preventing their removal to another location by the owner, where feasible, which would be doing unnecessary injury. But I think it cannot be properly said that the right of action exists in every case where notice has not been given, whether a notice would be of use or not. If the tree could not, by any possibility, be saved, or if the owner should not care to remove it, or if it were not practicable to do so profitably, there would be no damage, and a rule which subjects a municipality to damages and costs in such a case is, in my opinion, unjust, and at variance with Wyant v. Telephone Co. (Mich.) 81 N. W. 928, 47 L. R. A. 497. In that case it was held that the defendant was not liable, although no notice was given, nor opportunity afforded for the owner to cut the limbs, because no unnecessary injury was done. The same rule should apply to any other

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case of tree cutting, where the owner has not been subjected to damage. This question is discussed at length in an opinion by the writer in Miller v. Railway Co., 84 N. W. 49, where numerous cases sustaining the authority of municipalities to cut trees summarily are cited. The judgment should be reversed for error in the charge relating to the measure of damages.

NOTES.

Trees in Highway—General Doctrine.—In Chase *v.* City of Oshkosh, 81 Wis. 313, 51 N. W. Rep. 560, an action for damages for cutting down shade trees, it was said: "The right of the public to the use of the street for the purposes of travel extends to the portion set apart and used for sidewalks, as well as to the way for carriages, wagons, etc., and, in short, to the entire width of the street upon which the land of the lot owner abuts. As against the lot owner, the city, as trustee of the public use, has an undoubted right, whenever its authorities see fit to open, and fit for use and travel, the street over which the public easement extends, to the entire width; and whether it will so open and improve it or whether it should be opened or improved, is a matter of discretion, to be determined by the public authorities to whom the charge and control of the public interests in and over such easements are committed. With this discretion of the authorities, courts cannot ordinarily interfere, upon the complaint of the lot owner, so long as the easement continues to exist. * * * The public use is the dominant interest, and the public authorities are the exclusive judges when, and to what extent, the streets shall be improved. Courts can interfere only in cases of fraud and oppression constituting manifest abuse of discretion. It necessarily follows that, for the performance of this discretionary duty by the city officers in a reasonable and prudent manner, no action can be maintained against the city."

Same—Removal.—Growing trees within or without the limit of the highway interfering with public travel are liable to be cut down by a municipality without notice to the landowner. Ely *v.* Parsons, 55 Conn. 83, 10 Atl. Rep. 499; Hewison *v.* New Haven, 34 Conn. 136; Beardsley *v.* Hartford, 50 Conn. 529, 47 Am. Rep. 677.

Same—Question of Removal Discretionary with Town Officials.—The question as to whether trees standing along a highway, obstruct such highway and should be removed to give the public the benefit of unobstructed passage over the street is a matter within the *quasi* legislative discretion conferred upon town authorities. Turner *v.* Ringwood Highway Bd., L. R., 9 Eq. 422; Detroit *v.* Beckman, 34 Mich. 125; Jones *v.* New Haven, 34 Conn. 13; Boston *v.* Richardson, 13 Allen 159.

Same—Ownership—Liability of Trespasser for Injury.—A thrifty tree in a public highway, the fee of the soil of which is in the abutting landowner, belongs to the abutting landowner (unless it has been planted by the public authorities), and he may have trespass against any person who cuts down such trees growing on the side of the road, and left there for shade or ornament; for the freehold remains subject only to the easement or right of passage in the public. Nothing is more com-

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mon everywhere in our villages and agricultural districts than for the owners and occupiers of the soil to have fruit, shade, and ornamental trees along the line of the public roads, sometimes in the line of the roads, sometimes on each side of the line; and it has been held that a road overseer cannot arbitrarily cut them down, and, if he did it in an improper case and maliciously, he was held liable to exemplary damages upon suit of the owner of the fee of the soil. Winter *v.* Peterson, 24 N. J. L. 524, 527, 529, 61 Am. Dec. 678; Wuesthoff *v.* Seymour, 22 N. J. Eq. 66, 70; Atlanta *v.* Holiday, 96 Ga. 546, 23 S. E. Rep. 509; Quinton *v.* Burton, 61 Iowa 471, 16 N. W. Rep. 569; Bills *v.* Belknap, 36 Iowa 583; Crimson *v.* Deck, 84 Iowa 344, 51 N. W. Rep. 55; Wesner *v.* Flier, 91 Iowa 146, 59 N. W. Rep. 18; Wellman *v.* Dickey, 78 Me. 29, 2 Atl. Rep. 133; Evans *v.* Street Com'rs, 84 Hun (N. Y.) 206; Makepeace *v.* Worden, 1 N. H. 16; Niagara Falls Bridge Co. *v.* Bachman, 4 Lans. (N. Y.) 532; Tucker *v.* Eldred, 6 R. I. 404.

Same.—It is not to be denied that the abutting proprietor has rights as an individual in the street in his front, as contradistinguished from his rights therein as a member of the corporation, or one of the public. The trees standing in the street along the sidewalk are, in a restricted sense, his trees. If they are cut or injured by an individual who has no authority from the city to cut or remove them, he may recover damages of such individual. His property in them is such that the law will protect it from the act of such a wrongdoer and trespasser. Bliss *v.* Ball, 99 Mass. 597, Graves *v.* Shattuck, 35 N. H. 257, 69 Am. Dec. 536, are illustrations of this principle.

Same—Arbitrary Removal by Commissioner—Liability.—In Clark *v.* Dasso *et al.*, 34 Mich. 85, which was an action of trespass against a town commissioner for the wanton selling of plaintiff's shade trees, the court said: "When the commissioner proceeds to cause a man's shade tree to be removed, he is destroying or injuring the value of private property, and he should be prepared to justify his action, not upon his belief merely, but upon the actual fact. Every man is entitled to a trial of property rights, and if the commissioner acts upon his own judgment instead of instituting a prosecution, he must take such risk as there may be of a jury differing with him in opinion in case he is prosecuted. This is a very just and proper rule, and absolutely necessary to the proper protection of private rights in cases where a single wanton or heedless act might cause lasting injury."

Same.—If an overseer of the highway cuts down a tree which does not obstruct or interfere with the public use of the road he is a trespasser and if he does so maliciously is liable to exemplary damages. Winter *v.* Peterson, 24 N. J. L. 524, 61 Am. Dec. 678.

Rule in New Hampshire.—In New Hampshire it is held that the proper officer may cut down trees standing in the public highway only so far as is necessary to do so for the purpose of the easement or right of passage and the wood belongs to the owner of the soil. Makepeace *v.* Worden, 1 N. H. 16.

South Carolina.—In South Carolina, trees reserved for ornament or cultivated for use have always been respected as exempted from the operation of the act of 1788 authorizing the commissioners of roads to

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cut down timber, wood, etc., in or near roads. Eaves *v.* Ferry, 4 McCord (S. Car.), 125.

Trees in Highway—Property of City.—Shade trees in the public streets of a city are the property of the municipality; and it has complete control over them. Baker *v.* Normal, 81 Ill. 108.

Same—Nuisance—Question for Jury.—Whether trees in a public highway are public nuisances, is a question of fact for the jury in all cases. Phifer *v.* Cox, 21 Ohio St. 248.

Same—Right of Abutter.—An abutting owner may maintain an action of trespass to recover for the destruction of shade trees in the street in front of his premises. Bliss *v.* Ball, 99 Mass. 597; White *v.* Godfrey, 97 Mass. 472.

Same—Obstruction—Jurisdiction of Chancery.—Where two large trees were in the line of the sidewalk ordered, and the larger part of their bodies were within the limits upon which the sidewalk was located by the ordinance and the sidewalk could not be constructed in conformity with the ordinance, without cutting them down and removing them and if left standing, they would be permanent obstructions, *held*, that an order of the council to remove such trees could not justly be regarded as wanton, or as so unreasonable and oppressive as to give a court of chancery jurisdiction to interfere. Brush *v.* Carbondale, 78 Ill. 74.

Same.—If the shade trees in front of the plaintiff's house were not a nuisance at common law, nor so declared by statute, no ordinance or proceeding of the municipal authorities, or their agents, could justify their destruction, in the face of the objection of the plaintiff's husband. Miller *v.* Burch, 32 Tex. 208; Yates *v.* Milwaukee, *supra*; 1 Dill. Mun. Corp. § 374–379; Everett *v.* City of Council Bluffs, 46 Iowa 66.

Same.—"When abutting owners hold the fee in the streets, the city has no right to destroy shade trees, unless they grow within the street, so as to obstruct traffic." Bliss *v.* Ball, 99 Mass. 597; White *v.* Godfrey, 97 Mass. 472; Tainter *v.* Mayor, 19 N. J. Eq. 46; Cross *v.* Mayor, 18 N. J. Eq. 313; Bills *v.* Belknap, 36 Iowa 583; Everett *v.* Council Bluffs, 76 Iowa 66.

Same.—When shade trees neither impede the passage of vehicles, nor unreasonably obstruct the sidewalks, the municipal authorities may enact general ordinances to protect them, even against wanton injury or obstruction by the owner, but are not empowered, by orders or by-laws, to cause them to be removed, as nuisances, when, in law and in fact, they are not nuisances. McCarthy *v.* Boston, 135 Mass. 197.

CITY OF SHREVEPORT
v.
SHREVEPORT CITY RY. CO. *et al.* (No. 13,448.)

SAME
v.
SHREVEPORT BELT RY. CO. *et al.*

(*Supreme Court of Louisiana, April 23, 1900.*)

[29 So. Rep. 129.]

Street Railways—Paving.*—A street-railway company, in the city of Shreveport, is legally bound, under the provisions of sections 2, 3, Act No. 10 of 1896, and an ordinance adopted in pursuance thereof, to pay and reimburse to the municipality a sufficient amount to cover the cost of the pavement with vitrified brick of the space its roadbeds occupy in the streets of the city, and two feet on the outside of the rails on each side of said tracks in addition, such additional space being required for the operation of its tracks in the exercise of its franchise and right of way.

Opinion of Court—No Bar against Assertion of Rights of Company.—Notwithstanding the opinion of this court in City of Shreveport *v.* Prescott, 26 South. 664, 46 L. R. A. 193, 51 La. Ann. 1895, does not constitute a bar against the assertion of the rights of the defendant street-railroad companies, it is a strong and very appropriate precedent.

On Rehearing.

Assessment for Paving.—Act No. 10 of 1896 authorizes the assessment of street-railway companies for the paving of streets through which their roads run, and, in specific terms, establishes the basis upon which the liability of such companies is to be ascertained; and it is incompetent for a municipal corporation and a railway company, by convention, to change the basis so established so as to reduce such liability below that properly arising under the statute.

Same—Liability of Company for Paving.—In this case, an obligation with respect to street maintenance, entered into prior to the passage of the act of 1896, and predicated upon a franchise for a single-track road, having been superseded by a compromise, also relating to a single-track road, and entered into after the passage of that act, and such compromise having been thereafter annulled by a contract providing for the construction and maintenance of a double-track road, the fact that the stipulation in the last contract, with respect to the liability of the railway companies for paving, cannot be enforced, because repugnant to law, does not revive the pre-existing convention on the subject, inasmuch as the surrender of the franchise for the double track is neither demanded upon the one hand, nor tendered upon the other, but, on the contrary, said franchise is used for the purpose for which it was granted.

*See notes at end of case.

City of Shreveport *v.* Shreveport City Ry. Co

Under these circumstances, it is held that the liability of the companies for paving, *quoad* both tracks, should be determined by the statute, and, as thus determined, is in proportion to the space occupied by their roadbeds as compared with the entire space to be paved. It is also held that the graded and prepared soil, the cross-ties laid thereon, with the ballast and surfacing, make up the roadbed, and that its width is represented by the length of the cross-ties, and not by the space between the outer edges of the rails, nor yet by such space, plus "clearance space," upon either side of the track.

Same.—It is unnecessary, for the purposes of this case, to decide whether or not, in the absence of an express statute, or of any contractual obligation, a street-railway company is liable to local assessment upon its roadbed or track for the paving of a street through which the same is laid, and the court withholds its opinion upon that question.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Caddo; A. D. Land, Judge.

Actions by the city of Shreveport against the Shreveport Belt Railway Company and others. Causes were consolidated.

Judgments for plaintiff, and defendants appeal. Reversed.

Alexander & Wilkinson and Wise & Herndon, for appellants.

Edward Hughes Randolph, City Atty., for appellee.

Watkins, J. This suit is a sequel to that entitled City of Shreveport v. Prescott, 51 La. Ann. 1895, 26 South. 664, 46 L. R. A. 193, and presents the question for determination, what proportion or share of the cost of paving should be charged to the street-railway companies which are defendants? In the Prescott Case the railway companies were not made parties, and are not bound by the decree therein rendered, as between the city and the abutting property owners, fixing and determining the relative proportion which the city could assess against them under the law and ordinances which were drawn in question therein. The claim made on the part of the plaintiff is that, since the decision of the Prescott Case, the city has reformed its ordinance in conformity with the views expressed by this court, and levied against the Shreveport City Railway Company a local assessment for the purpose of reimbursing the cost of street paving, on the basis of 18 2-12 feet in width, as representing its proportionate share of same; this company owning a double-track roadbed, and operating thereon two lines of street cars. It also levied a similar local assessment against the Shreveport Belt Railway Company, for the purpose of reimbursing its proportionate share of the cost of street paving on the basis of 9 1-12 feet in width; this company owning and operating a single-track railway. To these assessments each com-

Case Stated.

pany makes separate resistance, and in this suit denies the legality of the local assessment under and by the authority of the city's reformed ordinance and the legislative enactment on which same is predicated; said assessments having been levied at the instance of the city alone, and without the co-operation of the defendants. It appears that local assessment, as it was made by the city under the ordinance, established the width of each single track at 5 1-12 feet, and estimated what is termed "clearance space" at 2 feet on either side of same, and by this means fixed the total width of the street for the purpose the same. And the application of that estimate resulted in charging the Shreveport Belt Railway Company with the cost of 9 1-12 feet of space, and the Shreveport City Railway Company with 18 2-12 feet of space. It appears from the ordinance of the city, of date January 14, 1897, that provision was made for paving with vitrified brick the streets on which the double tracks of the Shreveport City Railway Company were laid, and that, in pursuance of that ordinance, the municipal authorities made and entered into an agreement with a contractor on the 27th of May, 1897, to perform the work for the sum and price of $1.87 per square yard. The following is an extract from the contract, which is set out in full in an ordinance of the city, viz.: "The price of the aforesaid work, complete, is hereby fixed at $1.87 per square yard, which the contractor is to receive as follows: The abutting property holders throughout the whole limit of the streets and avenue paved are to pay two-thirds of the same area, at the rate of $1.87 per square yard, each one paying in proportion to frontage, according to section 3 of Act No. 10 of the Statutes of Louisiana for 1896; and the Shreveport City Railroad and the Shreveport Belt Railroad Companies are to pay [each one] in proportion to the space occupied by its roadbed, compared to the entire width of the streets [occupied thereby]; and, under its contract with the city of Shreveport, [same] is fixed at twelve feet from the corner of Spring and Texas streets, throughout the length of the afore-mentioned streets and avenues. * * * The balance of the cost of paving shall be paid by the city of Shreveport," etc. 51 La. Ann, 1910, 26 South. 670, 46 L. R. A. 207. On considering the foregoing provision of the city ordinance and the contract, we said: "From the foregoing provisions of the ordinance [and contract], it clearly appears that the abutting property holders have been assessed for two-thirds of the entire cost of the street improvement, according to the frontages of their respective properties; that the street-railroad companies have been assessed according to the space occupied by their roadbeds, compared to the entire width of the street; and that the residue of the expense is charged to the city, and payable from its general revenues," etc. Id. It was of this manner of apportioning the cost of the street paving that the defendants in the Prescott suit complained, and the burden of their

complaint was that the ordinance placed upon them as abutters more than their due proportion thereof. Of their objection to the local assessment as it was made, our opinion says: "The defendants deny the legality of the ordinance, and insist that it does not conform to the terms of the law, and they contend that the exaction demanded of them is illegal, and cannot be enforced. The contention of the defendants is that 'the statute in question authorizes the city to pave the streets, and directs that the cost of such improvement shall be borne in the proportion of two-thirds by the property holders on the street and one-third by the city.' Where a street railway occupies a part of the street, the law declares it shall pay in proportion to the space it occupies compared to the width of the street. No word of authorization appears anywhere, directly or indirectly, expressly or by reasonable implication, that what the railway pays the city is entitled to credit on its one-third of the expense." 51 La. Ann. 1911, 26 South. 671, 46 L. R. A. 208. The contention of the defendants was that, where the total cost of the street improvement was once ascertained, the law required of the city that it should first deduct therefrom the proportionate amount due by the street-railway companies according to the space that is occupied by their tracks as compared with the total width of the streets that were occupied by them, and prorate the remainder between the abutters and the city.

The provision of the law under consideration, and upon which the city ordinance is predicated, is of the following tenor, viz.: "That the owners of real estate so abutting shall pay two-thirds of the entire cost of such work of improvement, and the corporation shall pay one-third, from its general resources: provided, that where a railway bed or track occupies a portion of the street, it shall pay in proportion to the space occupied by its roadbed, compared with the entire width of the street." Section 2, Act. No. 10 of 1896. Upon careful examination and analysis of the law, and a comparison made between the law and the ordinance, we decide that the contention of the defendants was correct, and sustained the same.

So much of the contentions and decision in the Prescott Case was deemed necessary to a fair understanding and analysis of the controversy before us, it being one between the city and the railroad companies as to the proportionate amount of the local assessment put upon them; their objection to the city ordinance being principally that it charges them for more space than their tracks occupy.

The following are the grounds of resistance that are urged by the Shreveport City Railway Company, namely: "First. That from the date of its charter and franchise from the city of Shreveport to the adoption of the ordinance of the 7th of September, 1897, it operated, and had a right to operate, only a single-track railroad on the streets designated in the ordi-

nance granting said right, and its bed occupied on said streets the space of seven feet or less, and, under Act No. 10 of the Acts of 1896, was liable for the expense of paving said streets for that width only; and that soon after the city of Shreveport entered into a contract with John F. Talbot to pave said streets, as alleged in plaintiff's petition, and agreed that respondent have the payment therefor of a width of seven and three-quarters ($7\frac{3}{4}$) feet, and a proposition was made to respondent company by members of the city council and numerous influential citizens and property taxpayers of the city, and many of them abutters on said proposed paved street, to construct and operate a double or two parallel tracks; but respondent company realized that a single track would meet the requirements of the city for many years to come, if not for all time, and that double or parallel tracks would not materially, if at all, increase the revenues of said company, but in its construction, maintenance, and operation would entail an enormous additional expense on defendant, which it was unwilling to bear, and could not afford to bear, without some consideration, in view of the requirements of Act No. 10 of 1896. That in view of all these facts, and in consideration thereof, the plaintiff adopted an ordinance on September 7, 1897, permitting defendant company to lay a double or parallel track on Texas street, Common street, and Texas avenue, and, in consideration of the said additional grant, required defendant company to pave, in accordance with the contract betweeen the plaintiff and Talbot, the amount agreed to be paid by the city to said Talbot, to the extent of nine and five-twelfths (9 5-12) feet in width. That the adoption of said ordinance is a contract between the said city and defendant company, and cannot lawfully be abrogated and annulled, and can be complied with by said city without detriment or cost to the abutting property owners. Second. In the event that the said ordinance of the 7th of September, 1897, should be declared null and of no effect between the plaintiff and defendant company, as also the ordinance of July 10, 1897, then respondent avers that ordinance of May 4, 1891, requiring defendant company, as required in previous ordinances, to pave with rock or gravel a distance of three feet on each side of the rails, and a depth of eight inches, is in force and effect, and is the law governing the obligation to defendant company in regard to the paving of said streets, and under said ordinance and obligation the costs of paving with rock or gravel, as therein provided for, would be greatly less than the present Talbot contract. Third. That under no circumstances can defendant company be held liable for a space exceeding fourteen (14) feet in width, because each bed or tract occupies a space of only seven (7) feet in width or less. Fourth. By amended answer, respondent avers that the ordinance of the city of Shreveport is unconstitutional and violative of the constitution of the

state of Louisiana, and specially that it is violative of the constitution of the United States (section 10, art. 1), in that it devests vested rights, and impairs the obligations of a contract; the said contract which the said city seeks to impair being an ordinance of date May 4, 1891, July 1, 1897, and September 7, 1897, as alleged in respondent's original answer. The testimony shows that this railroad had been operated on the streets named a great many years, running horse cars, until about 1891 it changed to electric cars. In the spring of 1897, the city of Shreveport entered into a contract with one John F. Talbot to pave Texas street, Common street, and Texas avenue with vitrified brick, on a concrete foundation of eight inches, at a price of one dollar eighty-seven and one-half cents ($1.87½) per yard. It was soon apparent that the city authorities and the railroad company differed materially in regard to the expense that the railroad company should be put to under the paving contract, contending that, under prior ordinances, the company was only liable for the cost of paving with rock or gravel a depth of eight (8) inches and a width of two (2) feet on each side of the track. After numerous and lengthy conferences, the result was a compromise, by which the railroad agreed to pay for the width of seven and three quarter (7¾) feet, pursuant to the Talbot contract, and which was embodied in the ordinance thereafter adopted by the city council. Before the work had proceeded very far, influential citizens and property owners, many of them abutters on the streets named, with the aid of the press of the city, began to agitate the propriety of making a double track; arguing that, unless such double track was now laid, in the nature of things it never would be. The officials of the railroad company, as shown by the testimony of W. B. Jacobs, realized that a double track would be very much more expensive in its construction, maintenance, and operation than a single track, and would produce little or no additional revenues over a single track, and would, in fact, not be required by the public for many years to come, if ever. The pressure, however, of the ambitious citizens of the rapidly growing town continued, * * * both on the city authorities and on the railroad company, to consummate their cherished purpose. As an inducement to the railroad company to enter upon the scheme of a double track, the city of Shreveport was led to adopt the ordinance of the 7th of September, 1897, granting to said defendant company a right to construct a double track, and to pay for the paving to the extent of nine and five-twelfths (9 5-12) feet in width. It is in the power of the city to carry out this contract with the defendant without entailing any additional burden on the abutting property owners. As an illustration of this proposition, we will take the testimony of Engineer Kane, on page 15 of the record, in regard to the avenue. Kane says: 'It is a street eighty (80) feet in width, fifty-four (54) in width from curb to curb. Then, assuming

that from that space there be deducted a width of eighteen (18) feet and two (2) inches, occupied by defendant's railroad bed, it would leave a width of eleven feet and six-tenths of a foot to be chargeable to the property owners on each side, and the city would be chargeable for a like space. Therefore the city would have a space of eleven feet and six-tenths of a foot to provide for, and to that extent it could protect its contract with the defendant company, without adding one dollar to the burden imposed upon the abutters. If, in the interest of the public, it should be desirable to lay a railroad track and operate it along streets already paved, it would be entirely proper and legal for the city to grant said right, upon such terms and conditions as the city authorities might deem best, to the extent of relieving the railroad company from the payment of any of the expense that had been incurred for paving of same.'"

We gather from the foregoing statement of the points the defendants rely upon, and the argument of their counsel, in connection with the facts stated, that the Shreveport City Railway Company owned and operated only a single-track street railroad at the time the city ordinance proposing the levy of a local assessment was adopted, on the 14th of January, 1897, and at the time of the adjudication and acceptance of the contract for the performance of the work was completed, on the 27th of May, 1897, and that said company continued to thus operate its single-track railroad up to and inclusive of the 7th of September, 1897; that, under the terms and provisions of Act No. 10 of 1896, it was only liable for the cost of paving the space its roadbed occupied in the streets, and it is "the space of seven feet or less"; that soon after the city entered into a contract for the street pavement, and for certain reasons and considerations specified, it adopted an ordinance permitting and authorizing the company to construct another track parallel with, and in close proximity to, the track first laid; and that the city, "in consideration of said additional grant, required the defendant to pave in accordance with the contract between [the city and the contractor] to the extent of 9 5-12 feet in width."

The defendant, in its answer, sets up that ordinance as a contract between the city and the company, "which cannot lawfully be abrogated and annulled, and can be complied with by the city without detriment to the abutting property owners." But, in the alternative, that, if said ordinance should be declared null and of no effect, then defendant pleads the benefit of a prior ordinance, of date May 4, 1891, which required the defendant "to pave with rock or gravel a distance of three feet on each side of the rails, and [to] a depth of eight inches"; its insistence being that said former ordinance is now "in force and effect, and is the governing obligation of defendant company in regard to the paving of said streets, and under said ordinance and obligation the cost of paving

with rock or gravel, as therein provided for, would be greatly less than [under] the present Talbot contract." That under no circumstances can defendant be held liable for a space exceeding 14 feet in width, because each bed or track occupies a space of only 7 feet in width. That, finally, the amended ordinance is illegal, unconstitutional, and violative of the contract clause of the federal constitution, as an attempted impairment of its aforesaid contract rights under the ordinance of the 7th of September, 1897. The claim of the defendant is that the last-named ordinance was the result of a compromise, "by which the railroad agreed to pay for the width of 7¾ feet, pursuant to the Talbot contract, and which was embodied in the ordinance thereafter adopted by the city council." That statement evidently has application to the defendant's single-track railroad alone, as appears from the following additional statement, viz.: "As an inducement to the railroad company to enter upon the scheme of a double track, the city of Shreveport was led to adopt the ordinance of the 7th of September, 1897, granting to said defendant company a right to construct a double track, and to pay for the paving of 9 5-12 feet in width." Recapitulating the defendant's different contentions, we have the following propositions: (1) That under the city ordinance of May 4, 1891, when the company's road was first submitted to electricity, one of its stipulations was that it was required to pave with rock or gravel the roadbed of its single track, and for "a distance of 3 feet on each side of the rails, and to a depth of 8 inches; (2) that under the city ordinances of the 14th of January and the 27th of May, 1897, the company stipulated with the municipality for the paving of the width of 7 ¾ feet as the space occupied by its single-track roadbed; (3) that in the ordinance of the 7th of September, 1897, granting to defendant the right to construct and operate a double-track railroad, it was stipulated that the company was only to pay for the paving of the total space of 9 5-12 feet as the width of the roadbed of both tracks." The city claims the right under its ordinance, which has been reformed so as to comply with the requirements of the opinion of this court in the Prescott Case, to levy against the railroad company an assessment on the basis of 18 2-12 feet as the total width of the two tracks, including the space of 2 feet on each side of each track. Simplified, the defendant's complaints are substantially as follows, viz.: (1) Its charter or franchise only requires it to improve with rock or gravel, and that the imposition of the charge of paving with vitrified brick and concrete is about double its original obligation, and therefore the attempt to enforce this charge is violative of its contract rights, and null and void. (2) That the city made an agreement with it to only charge against it a width of 9 5-12 feet for paving these streets, and that the attempt to charge 18 2-12 feet is violative of the contract. (3) That, if the charge can be made for both tracks, the width imposed is ex-

cessive, as the roadbed of the railway does not occupy 18 2-12 feet.

There is but little controversy as to the fact that the assessment is properly placed at 18 2-12 feet, as the space occupied by the defendant's double tracks, including the 2 feet on either side of each track for the necessary clearance space for the operation of its trains. On this subject the testimony of the city engineer is as follows: "Q. Are you familiar with the assessments that have been offered in evidence? A. Yes. Q. Did you assist Mr. Murf, the comptroller, in making the figures as a basis for the assessment? A. Yes. Q. Is this assessment correct, on the basis of eighteen and one-half feet? A. Yes. * * * Q. How did you get the 18 2-12 feet? A. That is from measuring from the outer part of the outside rails, and adding two feet on each track. Q. What is the distance from outside to the outer rail? A. Fifteen feet and two inches. Q. What is the width of each track? A. Five feet and one inch; about 5 1-12 feet. Q. That makes 10 2-12 feet? A. Yes. Q. Then you add two feet on the outside of each track? A. Yes; and the distance is between those tracks, you see, that makes the 18 2-12 feet. Q. The width of each track, just considering the rails as they appear on the surface, is 5½ feet? A. Yes. Q. There are two tracks there? A. Yes. Q. Therefore the superficial space is 10 2-12 feet? A. Yes. Q. Actually covered by the tracks themselves? A. Yes; the space actually covered by the tracks themselves. Q. And the addition of four feet for each track makes the 18 2-12 feet? A. Yes. Q. Each track is 5 1-12 feet from the outside of one rail to the outside of the other? A. Yes. Q. And on the outside of each rail is two feet? A. Yes; and that makes the 18 2-12 feet. * * * Q. Have you measured the width of the cars? A. Not these new cars. I have measured the old ones. Q. And you found them how wide? A. They varied; some were 7½ and some were 8 feet. * * * Q. The neutral space between the tracks, —what was that measurement in between the rails? A. In between the rails, I think in the neighborhood of 5 feet. * * * Q. I understand that you have charged against the railroad from the outer rail to the outer rail and two feet on each side; and that, you claim, makes what? A. The 18 feet and 2 inches. Q. That measurement would embrace all the space between the double tracks? A. Yes; it takes in everything." This witness was carried over the same ground repeatedly, but his statements are all to the same effect; but the following interrogation is important, viz.: "Q. When these cars meet on the parallel tracks, can any ordinary vehicle use the space between them? A. No, sir. Q. And these cars have the right of way? A. Yes, sir."

The proof shows that the street upon which the defendant's road is constructed is 80 feet in width,—that is, 54 feet from curb to curb; and, upon the basis of the apportionment made by the city, the abutter would be liable for 23 4-12 feet, the

railroad company for 18 2-12 feet, and the city for 12 6-12 feet, leaving the banquettes out of the calculation. But, if the assessment be restricted to the 9 5-12 feet fixed in the ordinance of the 7th of September, 1897, we would have the following propositions, viz.: For the railroad company 9 5-12, for the abutters 29 4-12, and the city 15 3-12, feet. By this alteration, the share of the abutters would be increased to the extent of 6 feet of space, and that of the city would be likewise increased to the extent of 2 3-12 feet of space. It clearly appears that the defendant Shreveport City Railway Company was fully aware of the city ordinances of January and May, 1897, and of the city's engagement with the street contractor when it accepted the franchise from the city, on the 7th of September, 1897, to build a parallel track, and must have entered into its engagement with full knowledge of the situation, and that the paving was to be done with vitrified brick, and not with rock or gravel. Consequently, we are authorized to assume that the company was willing to pay for the paving according to contract. It also appears that, in so far as its first track is concerned, its engagement with the city was to pave for a distance of three feet on each side of its rails. And in its contract of September, 1897, that clause was neither abrogated nor withdrawn; on the contrary, the distinct claim is now made by defendants that said contract "is in force and effect, and is the law governing the obligation of defendant company in regard to the paving of said streets," etc. That might be perfectly true, were it not for its subsequent contract, which must be viewed as a modification of the former one, in respect to the material to be employed in the construction of the work, and it cannot be denied that the original contract establishes a president for the stipulation for the paving of two feet on the outside of each track. Not only so, but the ordinance of May 4, 1891, required the railroad company to pave the street instead of imposing that duty on the city, while all the ordinances of 1897 provide for the work to be performed by a contractor. In assenting to this change of obligation, the defendant clearly and unequivocally relieved itself from its individual obligation to pave the roadbed of its track and three feet on each side of same with rock or gravel, and, as a fair equivalent, consented to reimburse to the city or its contractor a sum equal to the cost of the construction of a space of two feet on the outside of each track with vitrified brick. At least, that seems to us to be a fair deduction from the facts related. In so far as the alleged contract of the 7th of September, 1897, proposes to fix a space of 9 5-12 feet as the limit of its liability, it seems to us entirely inadmissible, under the facts as we have detailed them, and in view of the principles of law that we announced in the Prescott Case.

Street Railways —Paving.

It is quite true that the railroad companies were not parties to the Prescott suit, yet the defendants made opposition to

the city ordinances of January and May, 1897, upon the ground that they conferred upon the railroad companies unjust advantages, to their prejudice, in plain disregard and violation of Act 10 of 1896, and it was that contention that we sustained, and our decree necessitated the reformation of the ordinance in that respect. While the judgment in the Prescott Case is no bar against the claims that are asserted by the defendants herein, it is a precedent of the highest rank and the strongest character. Not only so, but to decree the defendants entitled to the diminution of assessment would unsettle the principles that we announced in the Prescott Case, to the detriment and injury of both the abutters and the city, and the abutters would, in a great measure, if not entirely, lose the benefit they gained thereby. In our opinion in that case, among other things we said: "The foregoing consensus of judicial opinion [referring to the numerous decisions and extracts from text-books which are therein quoted] affirms the principle that the right of occupancy of a portion of the streets of a municipality by a street-railway corporation is property which is benefited by a street improvement to the extent of the space occupied by its roadbed and tracks, which render same liable for its proportionate share of its cost, just as the property of abutting property owners is liable; that the railway company using the streets for the operation of its cars is in duty bound to pay for the work on the streets which its tracks alone makes necessary,—that is to say, all expenses for that portion of the work lying between the exterior rails of the tracks of the road and for a distance of two feet from, and exterior to, the track on each side thereof; that in no case can any portion of the cost of such improvement be attributed to, or assessed against, the abutting property owners; that, where a statute or municipal ordinance makes provision for the assessment of a street-railway corporation for the pavement of such space as its tracks and roadbed occupy, such provision is mandatory, and any portion thereof which is put upon abutting property owners is illegal and void; that the very object and aim of such statutes are to relieve the municipality and abutting owners from defraying any portion of the cost incident to this part of street improvement." City of Shreveport v. Prescott, 51 La. Ann. 1929, 26 South. 678, 46 L. R. A. 214. Not only did this court quote and approve the principles announced, but we said that they justified "the strictest interpretation" of such paving statutes, and also "the construction we have given to the provisions of section 2 of Act No. 10 of 1896." And we further said that "this is particularly true of this statute, for the reason that it is the fiat of the general assembly, which confers upon municipalities plenary power upon their own motion, and without consulting the wishes of abutting property owners, to contract for unlimited street improvement at

Opinion of Court —No Bar against Assertion of Right of Company.

their cost." Id. But this court dealt with the question of relative space and proportionate share of the cost of street improvement more directly, and in so doing held that the provision of the ordinance of the 27th of May, 1897, which fixed the space that was occupied by the single track of the Shreveport Citv Railway Company at 9¼ feet, whereas it was alleged and proven to be occupying the space of 15½ feet, should be vacated, and in thus deciding our decree conformed to the opinion expressed, to the effect that "in no case can any portion of the cost of such improvement be attributed to, or assessed against, the abutting property owners." We are of opinion that the principles of law upon which the Prescott Case was decided are entirely correct, and in keeping with the jurisprudence of the courts of other states of the Union, and we deem them strictly applicable to the case that is stated by the railroad companies.

In this position of the respective rights of the abutters and the railroad companies, we come to the consideration of the alleged contract clause of the supplemental charter of the Shreveport City Railway Company, of date September 7, 1897. At the outset, it must be observed that the city ordinance of that date only granted to the company the right to construct and operate a new track parallel to its old one, which had been operated by electricity since 1891, and that the engagement that the city made with the contractor for paving the streets, including those on which its single track was being operated, had been in force several months, and under which the rights of abutting property holders had become vested in virtue of the ordinance and the law. In consequence thereof, any right that the corporation acquired under the ordinance and its supposed contract, even if strictly legal, ought not to be considered as possessing any retrospective effect, so as to impair the vested rights of abutters and materially increase their burden. But the decision appears to indicate a want of power to make such contract, and particularly when same are at variance with the express terms of the enabling statute under which such municipal contracts are made, and it is not surprising that authorities are abundant in support of the proposition that municipalities are incapable of making contracts at variance with the law. City of Shreveport v. Prescott, 51 La. Ann. 1922 et seq., 26 South. 664, 46 L. R. A. 193.

Recognizing the great importance of the legal questions that are involved, and that this cause required an examination, analysis, and application of the principles of our decision in the Prescott Case to the contract rights and legal obligations of the railroad companies, special care has been taken to adjust them according to a strict interpretation of the enabling statute and the legal rights of abutters, and, in so doing, we have arrived at the conclusion that the reformed ordinance and the assessment thereunder made against the Shreveport

City Railway Company have fairly accomplished the manifest purpose and object of the legislature in enacting the law of 1896.

The only point of objection that is taken by the Shreveport Belt Railway Company is that which relates to the amount of space with which it is legally chargeable under the law. It operates only a single-track street railroad, and the assessment made by the city under its reformed ordinance is for the cost of the pavement of 9 1-12 feet in width. Our investigation of the law and evidence sustains the assessment. The judge a quo correctly decided in favor of the city, and sustained the reformed ordinance and the assessments made against each of the defendants. Judgment affirmed.

Blanchard, J., takes no part in this decision, being recused on the ground of interest.

On Rehearing.
(Jan. 21, 1901.)

Monroe, J. In City of Shreveport v. Prescott, 51 La. Ann. 1895, 26 South. 664, 46 L. R. A. 193, it was held by this court that the proportion of paving for which the front proprietors are liable is to be ascertained by first deducting from the whole cost the proportion chargeable to the street-railway companies, and then dividing the remaining liability between the city and the front proprietors in the proportion of one-third to the former and two-thirds to the latter. As the street-railway companies were not parties to that litigation, the judgment did not bind them, or determine what proportion of the paving, if any, they are liable for. Upon the contrary, quoting the language of the opinion, that question was "left open for determination, contradictorily, by and between the interested parties,—that is to say, the abutting property holders, the street-railway companies, and the city,—so that the due proportion of the assessment chargeable against each may be legally ascertained according to law." City of Shreveport v. Prescott, 51 La. Ann. 1931, 26 South. 678, 46 L. R. A. 215. In the instant case, the "interested parties"—that is to say, certain of the abutting property holders, the street-railway companies, and the city—are before the court, presenting and asking to have determined the question, which was thus reserved until it should be so presented, i. e. for what proportion, if any, of the paving are the railway companies liable? The city is now claiming that they are liable, where they have double tracks, in the proportion to the whole cost that 18 2-12 feet bears to 54 feet; as it is claimed that the aggregate width of two tracks, plus 2 feet, called "clearance space," is 18 2-12 feet, and that the total width of the street between the curbs is 54 feet. The defendant companies, upon the other hand, stand, first, upon a contract embodied in an ordinance of September 7, 1897, fixing upon 9 5-12 feet as the total amount to be paved

Assessment for Paving.

by them for the two tracks; and, in the event of their not being sustained in that position, they claim the benefit of the contract of May 4, 1891, whereby they were to "rock or gravel" the street to a certain width; and, both positions being found untenable, they insist that the only law under which it can be claimed that the assessment of their property is authorized is specific to the effect that such assessment must be predicated upon the space occupied by the roadbed (citing Act No. 10 of 1896), and that, as their roadbeds occupy less space than they are assessed for, the assessment should be reduced. Dealing with the propositions of the defendant companies in the order in which they are stated, we are still of the opinion that it was incompetent for the city council, in September, 1897, to fix upon 9 5-12 feet as the width for which defendants should be assessed upon two tracks, irrespective of the actual width of the roadbeds upon which such tracks rest, for the reason that Act No. 10 of 1896 establishes the basis upon which the assessment is to be made, and neither the council, nor the companies, nor both of them, can effectively establish any other basis. The statute in question provides that, "where a railway bed and track occupy a portion of the street, it shall pay in proportion to the space occupied by its roadbed compared to the entire width of the street, and * * * that the intersections of all streets shall be paved at the expense of the municipality and railway, occupying a portion of the same, in the proportion to the space the said roadbed may occupy with relation to the whole intersection." The companies defendant must therefore pay in proportion to the space occupied by their roadbeds unless better cause to the contrary is shown than the ordinance of September, 1897.

This brings us to the next proposition, i. e. that, in the event that the court refuses to sustain the ordinance of September, 1897, the companies are entitled to the enforcement of the contract of May 4, 1891, whereby they were to "rock or gravel," to a certain width and depth, the street through which their track was laid. Conceding, arguendo, that the contract relied on, in case it becomes necessary to construe it, should be construed as claimed by the defendants, it does not follow that the alternative to the maintenance of the ordinance of September, 1897, is the enforcement of that contract. The evidence shows, and it is not denied, that there was an intervening contract entered into between the city and the railway companies upon June 9, 1897, whereby the companies agreed not only to bear a proportion of the expense of paving with brick, but also fixed upon 7¾ feet as the width which would properly represent that proportion, upon the basis of the single track which they then had. By this contract, they necessarily abandoned any rights which they might have had to limit their paving contributions to rock and gravel. And it was this contract which was in force when

the ordinance of September, 1897, was adopted, and which, therefore, the defendants are to appeal to in default of the enforcement of the provisions of that ordinance. No better evidence of this could be desired than the following language in the ordinance of September 7, 1897, taken in connection with the fact that the contract of May 4, 1891, is not mentioned therein, to wit: "* * * It is the intention of this ordinance to supersede, cancel and annul the compromise agreed upon between the city of Shreveport and the said Shreveport City Railway Company on June 9, 1897, and that all ordinances inconsistent herewith be and the same are hereby repealed, annulled and made of no effect, and that this ordinance is to take effect from and after its acceptance by the said Shreveport City Railway Company and by the said Shreveport Belt Railway Company."

If it is said that this agreement must also fall for the same reason that the contract of September, 1897, is held to be inoperative, the answer is that whether that reason is applicable or not depends upon whether both contracts present the same feature of repugnance to the law. The contract of September is invalid because it undertakes to establish 9 5-12 feet as the width, upon the basis of which, for a double-track road, the defendants are to be assessed for paving purposes; whereas the law establishes a different basis, calling for a greater width. The other contract undertakes to establish 7¾ feet as the width, upon the basis of which, for a single-track road, the defendants are to be so assessed, and it remains to be ascertained whether this is less or greater than the width required by the statute.

The statute, as we have seen, provides that a railway company "shall pay in proportion to the space occupied by its roadbed." The evidence adduced shows that the roadbeds of the defendant companies, measured by the length of the cross-ties used, are 7 feet in width, while the compromise of June 9, 1897, called for a width of 7 feet 9 inches. But the companies now say that it is not the width of their roadbeds that ought to be considered, but the space between the outer edges of the rails; for the reason that the cross-ties were laid merely to hold the rails in position until the concrete which serves as the foundation for the brick pavement, and, as they claim, for the rails, should harden. It is not denied, however, that the graded and prepared soil, with the cross-ties laid thereon, and the concrete ballast and brick surface, all form parts of the roadbed as actually constructed; and as the roadbed is as wide as its widest part, and as the cross-ties extend to a width of 7 feet, it follows that the roadbed is 7 feet wide, and it does not affect the question that it might have been made narrower by leaving out the cross-ties. We therefore conclude that the claim of the defendants that, for the purposes of the assessments, the width of their roads should be determined by the space between the outer edges of the rails,

rather than by the length of the cross-ties, is not well founded. Upon the other hand, the city and the property holders claim that the assessable width should be taken to be the space between the outer edges of the rails, plus 2 feet on each side for what is called "clearance space," i. e. space required for the operation of the cars, by reason of the fact that the body of the car is about that much wider than the track. Reviewing the adjudged cases on this subject, we find none that sanction the assessment of "clearance space," unless upon the authority of a statute specifically declaring that the assessment should be made in that way; and as the statute applicable to this case not only does not so declare, but specifically provides that the assessment shall be made upon another and a different basis, there is no authority in this state for the assessment of such space.

The suggestion might perhaps be made that the defendants are committed to an assessable width of $7\frac{3}{4}$ feet for each track by reason of the compromise of June 9, 1897. But we are of opinion that this view ought not to control. By the compromise referred to, the railway companies, in order to facilitate the city in the improvement of the streets by laying brick pavement, waived the question of their right to stand upon the contract of May 4, 1891, with respect to paving obligations, and not only agreed to share the expense of the pavement, but, apparently, under a misapprehension of facts, consented that their liability should be established upon a basis of measurement somewhat in excess of what the act of 1896 calls for,—the idea in fixing upon a width of $7\frac{3}{4}$ feet being that the cross-ties are 7 feet long, and that in renewing them it would be necessary to disturb the pavement for several inches on either side; whereas, it is shown that by cutting a defective tie in the middle it may be drawn from either end, and hence that the excavation need not be wider than the length of the tie; beyond which it is also shown that, as the roads in question are built, it is not contemplated that the ties will ever be renewed. Moreover, the contract was annulled by the contract of September 7, 1897, and, while the latter is declared to be inoperative in so far as it fixes the assessable width of defendants' roads at less than the statute calls for, it is not necessarily null in other respects, since rights have been acquired under it the surrender of which is neither demanded upon the one side nor tendered upon the other. It may therefore be considered as effective for the purpose of annulling the basis of assessment established by the compromise of June 9, 1897, which was the preliminary step to the attempt to establish another basis. And the fact that the basis thus attempted to be established has not been sustained does not revive that which was annulled, because, in the meanwhile, new conditions have arisen to which the provisions of the compromise in June are inapplicable. We therefore conclude that the

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defendant companies are liable to assessment for paving purposes, under Act No. 10 of 1896, in the proportion that the space occupied by their roadbeds bears to the width and length of the street to be paved, and that their roadbeds are to be held for such purposes, and as now constructed, to be 7 feet wide each. This conclusion renders it unnecessary that we should express any opinion upon the question whether in the absence of an express statute, or of any contractual obligation, the roadbed of a railway company is liable to local assessment for the paving of the street in which it is built.

Same—Liability of Company for Paving.

Same.

For the reasons assigned, it is ordered, adjudged, and decreed that the judgments rendered by the district court in these consolidated cases be now annulled, avoided, and reversed. It is further ordered that the liability of the defendant railway companies for assessment for the paving of the streets through which their roads run be fixed upon the basis of the proportion that the space occupied by the beds of said roads bears to the whole length and width of the streets paved or to be paved, and that, for the purposes of such assessment, the width of said roadbeds be, and the same is hereby, fixed at seven feet for each track. It is further ordered, adjudged, and decreed that, after deducting from the entire cost of paving the proportion due by the railroad companies as hereby fixed and established, the remaining liability be divided between the city of Shreveport and the front proprietors in the proportion of one-third to the former and two-thirds to the latter, save at the intersections of the streets, for which no liability rests upon such front proprietors. It is further ordered that all rights, liens, and privileges conferred upon the city of Shreveport by and under Act No. 10 of 1896, and other laws bearing upon the subject, be reserved, and that the case be remanded to the lower court for such further proceedings, in conformity to the views herein expressed, as may be necessary in the premises. It is further ordered that the plaintiff pay the costs of the appeal, and that the costs of the lower court be paid by the defendants.

Blanchard, J., takes no part in this decision, being recused on account of interest.

NOTES.

Street Railways—Assessment for Paving Street.—A railroad on a street may be assessed for paving, widening, or draining the street on which its tracks are laid. Appeal of North Beach & Mission R. R. Co., 32 Cal. 494; Troy & Lansingburgh R. R. Co. *v.* Kane, 9 Hun (N. Y.) 506.

Where the tracks of a railroad are laid upon a street, they are liable to assessment for keeping the street in repair. New Haven *v.* Fair Haven & W. R. Co., 38 Conn. 442; Chicago *v.* Baer, 41 Ill. 306. And even though there is an agreement on the part of the railroad company

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to keep the portion of the street occupied by it in repair. Parmelee *v.* Chicago, 22 Ill. 267.

Provisions are generally inserted in the charters of railroad companies, providing for the paving and repairing certain parts of the streets on which their tracks are laid, or they are agreed upon with the proper authorities. Chicago *v.* Sheldon, 9 Wall. (U. S.) 50; Coast Line R. R. Co. *v.* Mayor, etc., of Savannah, 30 Fed. Rep. 646; State *ex rel.* *v.* Corrigan, etc., St. Ry. Co., 85 Mo. 263.

Construction of Charter Provisions.—Where a street-railway company's charter requires it to keep a certain portion of the street, occupied by its tracks, well paved and in good repair, it was *held*, that it could be required to construct a pavement where there had been none when the road was built, and also, that the city had the power to designate the material from which it was to be made. District of Columbia *v.* Washington, etc., Ry. Co., 4 Mackey 214; Kitchell *v.* Manchester Road Electric R. Co., 79 Mo. App. 340.

Paving in and about Rails.—Where a street-car company covenanted with a city to pave the streets in and about the rails of its track in a permanent manner, and to keep the same in repair to the satisfaction of the street commissioner, *held*, that the obligation thus created extended to the entire space between the two tracks. Mayor, etc., of New York *v.* Second Ave. R. Co., 102 N. Y. 572, 26 Am. & Eng. R. Cas. 546, 102 N. Y. 572; McMahon *v.* Second Ave. R. Co., 75 N. Y. 231; Cambria Iron Co. *v.* Union Trust Co. of St. Louis (Ind.), 55 N. E. Rep. 745.

Under an ordinance of a city, a street-car company contracted to pave its track on a certain street, and two feet and four inches on either side, at its own expense "if the city should pave said street contemporaneously with the construction of complainant's railway." The street was paved by the city and the company assessed for the cost of excavation as well as for the paving. *Held*, that the company was only liable to pay for its portion of paving, and was not liable for the cost of excavation. Smith *v.* Fort St. & E. A. R. Co., 17 Mich. 66; Fort St. & E. A. R. Co. *v.* Schneider, 5 Mich. 71.

Where a city ordinance grants to a street-railway company the right to use certain streets and makes a provision for payment by the company for street improvement, *held*, the company was only chargeable with the cost of future improvements and not those already made. Gulf City St. R., etc., Co. *v.* Galveston, 69 Tex. 660, 32 Am. & Eng. R. Cas. 300.

A clause in the charter of a railroad company, exempting it "from taxes and assessments," or "from taxation for any purpose whatever," is held to exempt it from local assessments. Brightman *v.* Kirner, 22 Wis. 54; First Div. St. Paul & P. R. Co. *v.* City of St. Paul, 21 Minn. 526. But a clause providing that "no tax or impost" shall be assessed other than stipulated does not apply to local assessments. State *et al.* *v.* Elizabeth, 37 N. J. L. 330.

An obligation contained in the charter of a railway company, to keep a street in repair does not impose upon the company any obligation to repave it with new and different material. City of Baltimore *v.* Scharf (Md.), 10 Am. & Eng. R. Cas. 241; City of Chicago *v.* Sheldon, 9 Wall. (U. S.) 50; Cason *v.* City of Lebanon, 153 Ind. 567, 55 N. E. Rep. 768.

Where a statute directs that a street-railroad company shall repave

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the streets, etc., it does not authorize the city to require that the pavement shall be made of wood. City of Philadelphia *v.* Empire Pass. R. Co., 70 Phil. (Pa.) 321.

A provision of a city charter, that the common council is authorized "to require all railroad companies operating street railroads in any streets of the city to repave between their tracks and at least two feet on either side thereof whenever the common council shall deem such repavement necessary," is not mandatory and an assessment which provides that one-third of the assessment shall be borne by the city and two-thirds by the abutting lot owners is valid. Gilmore *v.* Utica, 121 N. Y. 561; Philadelphia *v.* Evans, 139 Pa. St. 483, 21 Atl. Rep. 200.

Where there is a provision in the charter of a street-railway company that it shall "keep the surface of the street between its tracks and for one foot outside in good and proper order and repair," unless it is shown to be necessary it will not be required to subsequently pave the street with asphalt. Where the city does the paving and assesses the company for the cost thereof it cannot recover unless it shows such paving to be necessary and a mere declaration by the city council that it is necessary is no proof of such necessity. Binghampton *v.* Binghampton & P. D. R. Co., 61 Hun (N. Y.) 479, 16 N. Y. Supp. 225; *In re* Repaving Fulton St., 29 How. Pr. (N. Y.) 429; State *ex rel. v.* Corrigan Con. St. R. Co., 85 Mo. 263; Western P. & S. Co. *v.* Citizens' St. R. Co., 128 Ind. 525, 26 N. E. Rep. 188; Middlesex R. Co. *v.* Wakefield, 103 Mass. 261; People *ex rel. v.* Fort St. & E. R. Co., 41 Mich. 413; Ridge Ave. Pass. R. Co. *v.* Philadelphia, 124 Pa. St. 219; Mayor, etc., of N. Y. *v.* Second Ave. R. Co., 102 N. Y. 572.

Where a company is bound to pave a street between its rails and to a distance of two feet beyond, which is more expensive than the cost of paving the rest of the street, the whole cost of paving that part of the street should be assessed to the railroad, and not the proportion of the cost which the part is required to pave bears to the whole street. Washington & G. R. Co. *v.* District of Columbia, 108 U. S. 522.

And in such case the cost of supporting the track by underpinning while the paving is being done is chargeable to the railroad. Washington & G. R. Co. *v.* District of Columbia, 168 U. S. 522.

If by statute, a street-railway company has been relieved from repairing and paving the street outside its tracks it cannot be made to repair or pave the space between its double tracks. City of St. Louis *v.* St. Louis R. R. Co., 89 Mo. 44. See also, St. Louis *v.* St. Louis R. Co., 50 Mo. 94.

Work Done by City—Liability of Company.—Where a street railway allows the city to proceed with its work of improvement, knowing that the municipal authorities expect it to bear the expense of such work and no objection is made by the company, *held*, that the company cannot object that its notice of the work did not strictly conform to the requirement of the ordinance. Columbus *v.* Street Ry. Co., 45 Ohio St. 98.

But when the company is only bound to repair but not to improve a street, mere inaction on its part will not estop it to deny liability where the city attempts to charge it with the cost of improvement. Western Paving Co. *v.* Citizens' St. R. Co., 120 Ind. 525.

If a railway company neglects, in terms of its obligation, to repair the

Notes

street, the city authorities may obstruct the street and proceed to make the necessary repairs themselves. Philadelphia & G. F. R. Co. *v.* Philadelphia, 11 Phil. (Pa.) 358; City of Columbus *v.* Columbus St. Ry. Co. (Ohio), 32 Am. & Eng. R. Cas. 292; Mayor, etc., *v.* Second Ave. R. Co. (N. Y.), 26 Am. & Eng. R. Cas. 546.

Contract Only Enforceable by the City.—A contract of a city with a railroad company "to replace and keep in repair the pavement between and at least two feet in width on each outer side of its tracks, is only enforceable at the instance of the city." Gilmore *v.* Utica, 121 N. Y. 561, 24 N. E. Rep. 1009.

And by such a contract, the city is not prevented from paving the whole street and assessing the expense thereof upon the abutting owners, as provided by the city charter. Gilmore *v.* Utica, 121 N. Y. 561, 43 Am. & Eng. R. Cas. 225.

What Agreement to Pave Embraces.—To pave a street is not necessarily to change its grade, as a paving may be done in any way that will make an even, hard substance. State *ex rel. v.* Jacksonville St. R. Co., 29 Fla. 590, 10 So. Rep. 590.

Macadamizing is not paving within the meaning of a statute and ordinance requiring street-car companies to pave streets. Leake *v.* Philadelphia (Pa.), 24 Atl. Rep. 351; State *v.* Ramsey County, 33 Minn. 351.

Voluntary Paving Does Not Create Obligation to Repave or Repair.—Where a railway company voluntarily paves the middle portion of a street on which its tracks are laid, such paving will not impose upon the company the cost of thereafter repairing and repaving the same part. Leake *v.* Philadelphia, 150 Pa. St. 643, 24 Atl. Rep. 351.

Repaving with New Material.—The obligation of a street-railway company imposed by its charter to keep the street embracing its track and two feet on each side thereof in repair, places it under no obligation to repave with new, different, and more costly material. Mayor, etc., of Baltimore *v.* Scharf, 54 Md. 499; Norristown *v.* Norristown Pass. R. Co., 148 Pa. St. 87; McKeesport *v.* McKeesport Pass. R. Co., 158 Pa. St. 447; Philadelphia *v.* Empire Pass. R. Co., 3 Brewr. (Pa.) 570, 7 Phila. (Pa.) 321.

Material Furnished by City.—Where an ordinance required a company to repave a street, using material furnished by the city, no recovery can be had against the company for paving done by the municipality upon company's failure to do it on demand, unless such material be in fact furnished by the city. Norristown *v.* Norristown Pass. R. Co., 148 Pa. St. 87, 23 Atl. Rep. 1060; Fort Wayne & E. R. Co. *v.* Detroit, 34 Mich. 78; Fort Wayne & E. R. Co. *v.* Detroit, 39 Mich. 543.

Where Two Companies Occupy the Same Street.—Where one company is liable for paving a street occupied by it, the fact that another company uses the same street makes no difference in the first company's liability. The city may bring an action against one company and force it to go against the other for contribution or it may sue both at once. Philadelphia *v.* Second & F. St. Pass. R. Co., 2 Pa. Dist. 705.

Right to Stop Cars While Repaving.—Where a city has not delegated the power to stop the running of cars on the street where improvements are being made to contractors doing the work, they will be enjoined

from interfering with car traffic, where the work can be done without such interference and at a slight increase of expense. Milwaukee St. R. Co. *v.* Adlam, 85 Wis. 142, 55 N. W. Rep. 181; Hamilton *v.* Vicksburg S. & P. R. Co., 119 U. S. 280.

Track Held Not to Be Real Estate.—In St. Paul City Ry. Co. *v.* District Court of Ramsey County (Minn.), 13 Am. & Eng. R. Cas. 419, it was held that a portion of the track of the St. Paul City Ry. Co. in a public street is not real estate within the meaning of sec. 3, tit. 1, subc. 7, of the city charter of St. Paul, and therefore not assessable for the expense of paving.

LEMMON

v.

TOWN OF GUTHRIE CENTER *et al.*

(*Supreme Court of Iowa, Jan. 21, 1901.*)

[84 N. W. Rep. 985.]

Restraining Order—Application—Notice.—Where a motion to dissolve a restraining order contained in the notice of the hearing of an application for an injunction is not passed on by the court making the order, its legality will not be considered on appeal.

Same—Temporary Injunction.—The fact that an unauthorized restraining order is made in a notice of the hearing of an application for an injunction does not make it error to issue a temporary injunction on the hearing.

Fire Limits—Violation of Ordinance.*—A building erected in violation of a fire-limit ordinance may be removed by the city without resort to judicial proceedings.

Mayor—Want of Authority.—Where the mayor of an incorporated town has no authority to hear a complaint or issue an execution for a removal of a building erected in violation of a fire-limit ordinance, the hearing of an application for an injunction to enjoin the town and its officers from removing the building may be had before the mayor renders a decision on a complaint asking for the removal of such building.

Allegations—Violation of Ordinance.—Where the plaintiff in an injunction suit, brought to restrain an incorporated town from removing a building alleged to have been erected in violation of a fire-limit ordinance, states that he intends to veneer the building, an appeal by the town from a temporary injunction granting the relief prayed for, but authorizing the town to make a motion to dissolve if the building is veneered within a certain time, does not raise the question whether the building was a violation of the ordinance.

Veneered Buildings—Permits.—A fire-limit ordinance which permits the erection of veneered buildings without first obtaining a permit, but which authorizes the town to remove a building in conflict with the ordinance on two days' notice, does not render invalid an injunction restraining the town from interfering for eight days with a building

*See notes at end of case.

which the owner intends to veneer, since he is entitled to reasonable time to erect the kind of building authorized by the ordinance.

Injunction—Removal.—Injunctions will lie to prevent an incorporated town from removing a building as an alleged violation of a fire-limit ordinance, since there is no adequate legal remedy for a wrongful removal thereof.

Appeal from district court, Guthrie county; J. H. Applegate, Judge.

An ordinance of the incorporated town of Guthrie Center fixed fire limits, and prohibited the establishment or erection of buildings or additions therein of wood or combustible materials, denounced a penalty for its violation, directed the mayor or marshal to notify any one violating the ordinance to desist therefrom and, upon failure to desist or remove, as notified, within two days, authorized either the mayor or marshal to enter the premises, and abate or remove the buildings and addition at the owner's expense. The plaintiff, on the 14th day of June, 1899, removed a wooden structure, from ground on which it was then standing, 28 feet, to make way for another structure. Two days thereafter he was served with written notice that, unless the building was removed within two days, the mayor would proceed to do so under the ordinance. On June 17th he was notified that on the 19th, at 10 a. m., the marshal would file a complaint before the mayor, asking "a writ of execution for the purpose of abating and removing" the building, unless sooner placed beyond the fire limits, and required him to appear and defend. At the time stated, and during the progress of this trial before the mayor, the plaintiff presented his petition to the district judge, praying for a writ of injunction. The judge issued a notice of hearing at 1:30 o'clock p. m. of the same day, in which defendants were required "to leave the said building in the situation it is now in, and refrain from making any order in relation thereto." Upon hearing, a temporary writ was ordered, restraining defendants from interfering with the building, with permission to move for dissolution, "unless plaintiff on or before the 30th day of June, 1899, should comply with the ordinance of the town of Guthrie Center by properly inclosing the building in controversy in a suitable and substantial brick veneer." From this order the defendants appeal. Affirmed.

Case Stated.

Chas. W. Hill and Henry B. Holsman, for appellants.

W. D. Milligan, for appellee.

Ladd, J. If the admonition of the judge in the notice of the hearing not to interfere with the building be regarded as a restraining order, no ruling was ever entered on the motions to dissolve. These appear to be undisposed of and, until some ruling by the trial judge or court is had, the propriety of making such an order *without* notice cannot be questioned in this court. Even

Restraining Order—Application—Notice.

were it unauthorized, that fact would furnish no reason for not issuing the temporary writ after a full hearing. Same—Temporary Injunction. Nor did the pendency of the proceeding before the mayor of Guthrie Center, in which a writ of execution directing the marshal to remove the building beyond the fire limits was sought, interpose any obstacle to granting the relief prayed. Neither the ordinances of the town nor the statutes of the state confer jurisdiction on the mayor's court to issue such a writ. Nor was any such action necessary. The ordinance empowered the mayor or marshal, in virtue of his office, in event of the owner's failure to desist or remove on two days' notice, "to enter on said premises, and abate or remove the same." No order or writ of execution was essential. A building erected in violation of an ordinance fixing fire limits may be torn down or removed Fire Limits—Violation of Ordinance. without any judicial proceeding whatever. Eichenlaub v. City of St. Joseph, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590; Hine v. City of New Haven, 40 Conn. 478; King v. Davenport, 98 Ill. 305; Baumgartner v. Hasty, 100 Ind. 575; Klingler v. Brickel, 117 Pa. St. 328, 11 Atl. 556; McKibbin v. Ft. Smith, 35 Ark. 352. Delays of that character might endanger the public safety, Mayor—Want of Authority. and ought not to be tolerated. As the mayor was without jurisdiction, there was no occasion for postponing the hearing until he had rendered a decision.

The statute confers the power on towns and cities "to establish fire limits, and to prohibit within such limits the erection of any building or addition thereto" unless the outer walls be of a material named; and, as the plain- Allegations—Violation of Ordinance. tiff declared his intention to veneer the building, the order merely gave him an opportunity to do so, without deciding whether a removal from one lot to another or a different part of the same lot within the prescribed limits constituted an erection thereof within the meaning of section 711 of the Code. That question, then, is not before us. But see Wadleigh v. Gilman, 12 Me. 403, 28 Am. Dec. 138; Brady v. Insurance Co., 11 Mich. 451; Kaufman v. Stein, 138 Ind. 49, 37 N. E. 333; Brown v. Hunn, 27 Conn. 332, 71 Am. Dec. 71. Whatever the conclusion on that point, it does not follow that removals may not be prohibited by an ordinance of the town or city, under a statute like ours, as a regulation against the danger by fire. The ordinance in this case contained no provision requiring the procurement of a permit preliminary to the erection or removal of a building, but it stipulated that "any frame building with four-inch veneer of the outer walls" and a roof of noncombustible material should be construed as complying with its conditions. Of necessity, the superstructure must be erected or located in some situation before the brick may be placed, and the owner is entitled to a reasonable time within which to accomplish this. The plaintiff appears to have contracted for a sheet-iron covering

prior to the removal, but, upon discovering this did not comply with the ordinance, arranged to put on a brick veneer. The order allowed him eight days within which to accomplish this, and it cannot be thought an unreasonable time. The two-days notice to desist or remove does not limit the time of completion; otherwise, the ordinance in effect, because of the brevity of period fixed, would prohibit the very structures it authorizes. Until the plaintiff had a reasonable time within which to put his building in the condition exacted by the ordinance, the officers had no right to tear it down or remove it.

Veneered Buildings—Permits.

But it is said a trespass merely was threatened, and that for this the law affords ample remedy. It appears that plaintiff was about to make use of the building in which to store tools and materials during the construction of an addition to a brick block near by, that there was no other accessible shelter, and that the defendants proposed to remove it beyond the fire limits. The rule that equity will not interfere with a threatened trespass save to prevent irreparable injury has been too often declared for repetition. What will constitute such an injury is sometimes difficult to determine. The general grounds for such relief are enumerated in Cowles v. Shaw, 2 Iowa, 496; City of Council Bluffs v. Stewart, 51 Iowa, 385, 1 N. W. 628, and other cases. The entire question seems to hinge on whether the damages actually recoverable at law will, in the nature of things, afford adequate compensation; and the rule resulting from all the cases is perhaps more clearly stated by Pearson, J., in Gause v. Perkins, 3 Jones, Eq. 177, 69 Am. Dec. 728, than elsewhere: "The word means that which cannot be repaired, put back again, atoned. * * * The injury must be of a peculiar nature, so that compensation in money cannot atone for it. Where, from its nature, it may thus be atoned for, if in the particular case the party be insolvent, and on that account unable to atone for it, it will be considered irreparable." Mr. Freeman, in a note to Jerome v. Ross, found in 11 Am. Dec. 501, thus enumerates the reasons why "an injury resulting from trespass may be incapable of compensation": "(1) It may be destructive of the very substance of the estate; (2) it may not be capable of estimation in terms of money; (3) it may be so continuous and permanent that there is no instant of time when it can be said to be complete, so that its extent may be computed; (4) it may be vexatiously persisted in, in spite of repeated verdicts at law; (5) it may be committed by one who is wholly irresponsible, so that a verdict against him for damages would be entirely valueless; (6) it may be committed against one who is legally incapacitated from a beneficial use of the remedy at law. Generally, however, in cases where equitable relief is granted, the injury will be found to include several of these features." It needs no argument to show that the mere deprivation of the

use of this building as a storehouse would not be an irreparable injury. If any there could have been, it was because the mischief threatened "reached" to the substance and value of the estate, and went to the destruction of it in the character in which it was enjoyed. Thus a party may be enjoined from cutting down trees. Musch v. Burkhart, 83 Iowa, 301, 48 N. W. 1025, 12 L. R. A. 484; Shipley v. Ritter, 7 Md. 408, 61 Am. Dec. 371. And see, generally, cases collected in which the injury threatened has been adjudged of such a character as would tend to destroy the estate or its enjoyment in note to Dudley v. Hurst, 1 Am. St. Rep. 368 (s. c. 8 Atl. 901). This building appears to have been permanently located, and a part of the land. Was its removal beyond the fire limits such an injury to the real estate as would justify an injunction without any showing of insolvency on the part of defendants? In England, "if an alleged trespasser is about to tear down a dwelling house, an injunction will be issued without an averment that he is insolvent; for although, with money enough, as good or a better house can be built, still it involves a matter of feeling,—there is an attachment to the house in which our ancestors lived." Gause v. Perkins, supra. What force might be given to such a sentiment in this country, where little attention is bestowed on the incident of lineage, need not now be discussed. In Echelkamp v. Schrader, 45 Mo. 505, the defendant was enjoined from sawing a double house in two at what he supposed the line, but in fact over the portion occupied by plaintiff three feet. So, in De Veney v. Gallagher, 20 N. J. Eq. 33, a party was restrained from removing 10 inches of a dwelling house which he supposed extended that distance over the boundary. These decisions seem to rest on the principle that a person will not be disturbed in his dwelling house pending the adjustment of a dispute over a boundary line. In Clowes v. Beck, 13 Beav. 347, the removal of material near plaintiff's mansion house, exposing it to the encroachments of the sea, pending the institution of an action at law, was enjoined. In Lewis v. Town of North Kingstown 16 R. I. 15, 11 Atl. 173, 27 Am. St. Rep. 725, the road supervisors were enjoined from removing a building from plaintiff's lot; but this appears to have been, in part at least, on the ground that it was proposed to grade and obliterate the boundaries. In District Tp. of Lodomillo v. District Tp. of Cass, 54 Iowa, 117, 6 N. W. 163, the removal of a school house was enjoined, for that its use was essential to enable the plaintiff to perform its duty in maintaining the public schools. In Bank v. Sarlls, 129 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185, and Heffran v. Hutchins, 160 Ill. 550, 43 N. E. 709, 52 Am. St. Rep. 353, the removal of buildings to lots within the fire limits was enjoined. See, also, Ryan v. Brown, 18 Mich. 196; Whitmer's Appeal, 45 Pa. St. 455; Weigel v. Walsh, 45 Mo. 560. But in these cases some other ingredient was super-

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Injunction—Removal.

added to the destruction of the buildings on the land; i. e. that which was essential to its enjoyment, regardless of the money measure of the injury. But an examination of all the cases, as is well observed by Mr. Freeman in his note to Jerome v. Ross, supra, indicates a strong tendency to grant equitable relief whenever the trespass permanently diminishes the substance of the estate in that which constitutes its chief value, without reference to the fact that the value may be measured in money, on the ground that the plaintiff is entitled to have the identity and integrity of his estate preserved. The removal of this building was an interference with the real estate, such as to absolutely deprive the plaintiff of the beneficial enjoyments of its present use. No one can say much advantage is to be derived from a naked lot so located. Besides, he had the right to the occupancy of the land with the building thereon. He was entitled to its enjoyment, rather than of the damages occasioned by stripping it of the very improvement designed for his particular purposes. The structure, in that sense, was part of the land, and the threatened injury went to the destruction of it in the character in which it was enjoyed; and when the destruction or removal of a permanent structure, which in law is deemed a part of the real estate, and designed for the owner's particular use, is threatened, we think he should be protected in its enjoyment, and to that end a writ of injunction may issue. There is a wide difference between such a case and the mere removal of stone or earth, which in no way interferes with occupancy, and the only damages is the value or cost of replacing. Affirmed.

NOTES.

Fire Districts—Removal of Wooden Buildings—Judicial Hearing.—Where a municipal corporation has the power to prohibit the construction of wooden buildings in a district defined by ordinance, and has enacted an ordinance to that effect, it may remove any building erected in violation of the ordinance, and this, too, without any judicial proceeding whatever. McKibbin *v.* Fort Smith, 35 Ark. 352; Klinger *v.* Bicket, 117 Pa. 326, 11 Atl. Rep. 555; King *v.* Davenport, 98 Ill. 305, 38 Am. Rep. 89; Hine *v.* New Haven, 40 Conn. 478. As said in the case last cited: "Police powers of this character are of a higher order, and when a case arises, should be speedily exercised. Delays incident to the ordinary process of the law would seriously impair their efficiency, and could not be tolerated." Wadleigh *v.* Gilman, 12 Me. 403; Brady *v.* Ins. Co., 11 Mich. 425; Douglas *v.* Commonwealth, 10 Watts (Pa.) 307; Vanderbilt *v.* Adams, 7 Cow. (N. Y.) 349; Charleston *v.* Reed, 27 W. Va. 681; Knoxville *v.* Bird, 12 Lea (Tenn.) 121.

Same—Same.—In King *v.* Davenport, 98 Ill. 305, 38 Am. Rep. 89, it was held that an ordinance providing for the summary destruction of a wooden building erected within forbidden territory was valid. In the course of the opinion, it was said: "There can be no doubt, it seems to

us, that the ordinance in question was a police regulation, proper, and made in good faith, 'for the purpose of guarding against the calamities of fire' in a populous neighborhood; and we must regard it as an entirely reasonable regulation. There is no more frequent or admittedly proper exercise of the police power than that of the prohibition of the erection of buildings of combustible materials in the populous part of a town, and the only means of making such prohibition effectual is by a summary abatement. Every moment's delay in the removal of the nuisance is constant exposure to danger. Before any judicial hearing could be had in the matter, the whole evil sought to be guarded against might be produced." Corporation of Knoxville *v.* Bird, 12 Lea (Tenn.) 121; City of Salem *v.* Maynes, 123 Mass. 372; Field *v.* City of Des Moines, 39 Iowa 575.

Same—Power of City Inherent.—Even where there is no legislative grant, a corporation has the inherent power to forbid the erection of wooden buildings in a thickly populated section of a city and compel the removal of such. Monroe *v.* Hoffman, 29 La. Ann. 651; McCloskey *v.* Kreling, 76 Cal. 511, 18 Pac. Rep. 433; Aronheimer *v.* Stokley, 11 Phila. (Pa.) 283; McKibbin *v.* Ft. Smith, 35 Ark. 352; King *v.* Davenport, 98 Ill. 305; Klinger *v.* Bicket, 117 Pa. St. 326, 11 Atl. Rep. 555; Louisville *v.* Webster, 108 Ill. 414.

Same—Injunction—Right of Wrongdoer.—Where one who wrongfully erects a wooden building within prescribed fire limits, a court of equity will not grant a restraining order to prevent the removal of the building by a municipality, at the instance of such wrongdoer. Aronheimer *v.* Stokley, 11 Phila. (Pa.) 283; Hine *v.* New Haven, 40 Conn. 478; Mayor *v.* Thorne, 7 Paige (N. Y.) 261; Manchester *v.* Smyth (N. H.), 18 Am. & Eng. Corp. Cas. 474; St. Johns *v.* McFarlan, 33 Mich. 72.

City of New Orleans

v.

Faber. (No. 13,806.)

(*Supreme Court of Louisiana, March 5, 1901.*)

[29 So. Rep. 507.]

Markets—Regulation by Ordinance.*—The ordinance of the New Orleans city council, No. 312, N. C. S., adopted under the authority of Act No. 34 of 1900, in prohibiting private markets within 3,200 feet of the public markets, violates none of the provisions of the state or federal constitutions which are here invoked.

Same—Police Power.—It is within the police power and legislative discretion of the city of New Orleans, under said act of the general assembly, to require certain food commodities to be sold only in the public markets; and the fact that the ordinance in question may have the effect of compelling dealers in such commodities to go into the public

*See notes at end of case.

markets, or else to go out of business, does not affect the validity of the ordinance.

Same—Authority to Build Markets and Collect Revenue.—It is competent for the city, under existing laws, to authorize persons to build markets and to collect the revenues thereof for a fixed period, in consideration of their conveying the property to the city; such markets to be under the control of the city, and to be, in all respects, governed by the regulations applicable to other public markets.

(Syllabus by the Court.)

Appeal from recorder's court of city of New Orleans; Christopher E. Murray, Judge.

Action by the city of New Orleans against August Faber. Judgment for plaintiff. Defendant appeals. Affirmed.

E. Howard McCaleb, Emile J. Meral, and E. Howard McCaleb, Jr., for appellant.

Samuel L. Gilmore, City Atty., and H. Garland Dupree, Asst. City Atty., for appellee.

Monroe, J. Defendant, having been charged with the violation of City Ordinance No. 312, New Council Series, undertook to defend himself by setting up the unconstitutionality of the ordinance and of the law under the authority of which it was adopted, and, having been convicted and sentenced, has appealed directly to this court. The ordinance in question makes it unlawful for any person "to conduct a private market, or to sell at retail any fresh meat, fresh fish, game, poultry or vegetables, except potatoes and onions, in any building, place, store, or stand, within thirty-two hundred feet, walking distance, from any public market, in the city of New Orleans," prohibits the sale of oysters and groceries in the public markets, and contains some other provisions which need not be specially noticed. The act of the general assembly referred to (being Act No. 34 of 1900) authorizes the council of the city of New Orleans "to pass such ordinances for the government and regulation of private markets, in the city of New Orleans, as they, in their discretion, may deem proper," and to provide for the enforcement of the same, especially authorizing said council to "prescribe the manner in which such private markets shall be kept, and the distance at which they may be located from all public markets." There is no dispute as to the facts, and the questions of law which are presented are not unfamiliar to this court.

Case Stated.

1. It is said that the defendant had complied with the pre-existing law (Acts No. 116 of 1888, and Ordinance No. 7607), and had established his business, in conformity thereto, within the populous district of the city; that he had thereby acquired rights which cannot be devested by subsequent legislation; and that, in so far as Act No. 34 of 1900 requires the removal of said business beyond said district, it is uncon-

stitutional. Stated in other words, the proposition is that, because the defendant had established his business in conformity to the law and the ordinances in force prior to the adoption of Act No. 34 of 1900, he had thereby placed said business beyond the reach of the lawmaking power, and had acquired a vested right to conduct the same business in the same place and in the same manner forever. This proposition is untenable, and ignores the very premise upon which it rests. Thus, the defendant had established his business in conformity to Act No. 116 of 1888 and the city ordinance adopted under its authority. But that legislation was but the reassertion by the state and the city of the power to control, at discretion, the question of the location and regulation of private markets. In 1866 the general assembly, by Act No. 134 of the session of that year, had authorized the establishment of private markets everywhere, subject to the police ordinances of the city. In 1874, by Act No. 31, private markets were prohibited within 12 squares of the public markets. In 1878, by Act No. 100, they were prohibited "within a radius of six squares" of the public markets. But the use of the word "radius" gave rise to some trouble, as a question of construction, and in 1888 Act No. 116 was passed prohibiting private markets "within a walking distance of six blocks from any public market; the said distance to be interpreted as meaning that represented by six blocks in a walk from the public market to a private market." When, therefore, the defendant established his market agreeably to the provisions of this last-mentioned act, and of the ordinance adopted under its authority, he conformed to a law which changed the preexisting regulations upon the subject, with presumed knowledge of that fact, and of the further fact that the authority to make and unmake such law had always been exercised by the state and city, as part of the police power, and had been uniformly recognized and enforced by the courts. In the case of City of New Orleans v. Stafford, 27 La. Ann. 417, it was said: "There is in the defendant's case no room for any well-grounded complaint of the violation of a vested private right; for the privilege, if he really possessed it, of keeping a private market, was acquired subordinately to the right existing in the sovereign to exercise the police power to regulate the peace and good order of the city, and to provide for and maintain its cleanliness and salubrity. * * * We presume that it will not be denied that, under circumstances of peril and emergency, the lawmaker would have the right to abolish or suspend an occupation imperiling the public safety. This power is inherent in him. He may exercise it prospectively, for prevention, as well as, pro re nata, for immediate effect. It is within his discretion when to exercise this power, and persons under license to pursue such occupations as may, in the public need and interest, be affected by the public power, embark in those occupations subject to the disadvantages

which may result from a legal exercise of that power." See, also, Morano v. Mayor, 2 La. 219; First Municipality v. Cutting, 4 La. Ann. 335; State v. Gisch, 31 La. Ann. 544; City of New Orleans v. Wolf, 36 La. Ann 986; State v. Natal, 38 La. Ann. 967; Id., 39 La. Ann. 439, 1 South. 923; Gossigi v. City of New Orleans, 41 La. Ann 522, 6 South. 534; State v. Garibaldi, 44 La. Ann. 809, 11 South. 36; Natal v. Louisiana, 139 U. S. 621, 11 Sup. Ct. 636, 35 L. Ed. 288. Judge Dillon says upon this subject: "Many of the powers exercised by municipalities fall within what is known as the 'police power' of the state, and are delegated to them to be exercised for the public good. Of this nature is the authority to suppress nuisances, preserve health, prevent fires, to regulate the use and storage of dangerous articles, to establish and control markets, and the like. * * * Every citizen holds his property subject to the proper exercise of this power either by the state legislature directly, or by public or municipal corporations to which the legislature may delegate it." 1 Dill. Mun. Corp. (4th Ed.) § 141.

2. It is urged that Ordinance No. 312, N. C. S., is unconstitutional, in that it deprives the defendant of his liberty and of his property without due process of law. This objection is answered by the opinion of the supreme court of the United States in the case of Natal v. Louisiana, 139 U. S. 621, 11 Sup. Ct. 636, 35 L. Ed. 288, as follows, to wit: "The plaintiffs in error were severally complained of, tried, convicted, and sentenced in a recorder's court of the city of New Orleans for keeping a private market in violation of paragraph 4 of an ordinance of the city copied in the margin, and passed under the authority conferred by the statute of Louisiana of 1878 (No. 100), as follows [quoting the statute]. The cases were consolidated, and on appeal to the supreme court of the state the judgments were affirmed. 39 La. Ann. 439. The plaintiffs in error contended in the recorder's court, and afterwards assigned for error, that their privileges and immunities as citizens of the United States had been abridged, and that they had been deprived of liberty and property without due process of law, and had been denied the equal protection of the law, contrary to the fourteenth amendment of the constitution of the United States. The case is too plain for discussion. By the law of Louisiana, as in states where the common law prevails, the regulation and control of markets for the sale of provisions, including the places and distances from each other at which they may be kept, are matters of municipal police, and may be intrusted by the legislature to a city council, to be exercised as, in its discretion, the public health and convenience may require. [Citing authorities.] The ordinance of the city of New Orleans prohibiting the keeping of a private market within six squares of any public market of the city, under penalty of a fine of twenty-five dollars, and of imprisonment of not more than

Markets—Regulation by Ordinance.

thirty days if the fine is not paid, was within the authority constitutionally conferred upon the city council by the legislature of the state. A breach of such an ordinance is one of those petty offenses against municipal regulations which, in Louisiana as elsewhere, may be punished by summary proceedings before a magistrate, without trial by jury. * * * Judgment affirmed."

3. But it is said that the defendant in this case, and others similarly situated, will be compelled to abandon the private-market business, because the ordinance complained of will force them into the uninhabited sections of the city, where such business will be unprofitable.

Same—Police Power.

The act of 1874, as we have seen, prohibited private markets within twelve squares of the public markets, —a greater distance, as compared with a smaller population, than the 3,200 feet prescribed by the present ordinance. The act was, however, held by our predecessors in this court to be constitutional. City of New Orleans v. Stafford, supra. And if it be true, as was said by the supreme court of the United States in the case cited above, that "the regulation and control of markets for the sale of provisions, including the places and the distances from each other at which they may be kept, are matters of municipal police, and may be intrusted by the legislature to the city council, to be exercised as, in its discretion, the public health and convenience may require," it is plain that the distance between public and private markets may as well be fixed at 3,200 feet as at 12 or 9 or 6 squares; and the fact, that a particular individual is unable to find in a place beyond the prescribed limit within which he can conduct his business profitably does not affect the question, since, in the exercise of the power and discretion vested in it, the council might at once, and in direct terms, prohibit the sale of provisions elsewhere than in the public markets. Mr. Tiedman, in a late work, entitled "State and Federal Control of Persons and Property" (volume 1, p. 557), says: "Not only has the legislature exercised the power of confining the prosecution of certain trades to certain localities, but it has very often, particularly in respect to the vending of fresh meat and vegetables, prohibited the plying of the trade in any other place than the market which is established and regulated by the government. This regulation is very common in all parts of this country, and has frequently been the source of litigation, but it has generally been held to be reasonable." And he cites a number of authorities in support of the view thus expressed, and quotes in extenso from the opinion in City of New Orleans v. Stafford, as forcibly presenting the "reasons which justify this police regulation." Judge Dillon writes to the same effect, viz.: "The states, under their police power, may delegate to municipal corporations the authority to establish or authorize the establishment of markets, and it is competent to such corporations, under proper grants of power, to

enact ordinances prohibiting sales and purchases of marketable articles except at designated market places. * * * In England the regulation of markets by by-laws has long been exercised, and such by-laws are sustained as being reasonable and conducive to the health and good government of the municipality. In this country the practice is almost universal on the part of the legislature to confer upon the municipal agencies more or less authority with respect to markets and market places, and such grants are not so strictly construed as those which invest the corporation with a power of a more extraordinary or unusual character. At least, such is the case unless a monopoly in favor of private individuals is sought to be sustained, against which the courts strongly lean." 1 Dill. Mun. Corp. (4th Ed.) § 1380. "There can be no doubt," said this court, "that the city, under the legislative permission, can forbid the opening of markets except at designated places, and such forbidding is an exercise of its power to regulate markets." State v. Gisch, 31 La. Ann. 544.

4. It is claimed that the ordinance in question unjustly discriminates in favor of certain persons who have obtained contracts to establish markets within 3,200 feet of the public markets. It appears from the record that the city saw proper to arrange for the establishment of markets in a few localities where they were presumably needed, by making contracts whereby certain individuals agreed to build such markets and to convey the same, with such ground as they were to be built upon, to the city, and thereafter to maintain such markets, subject to all the regulations applicable to public markets, on condition that, in lieu of a sum of money to be paid by the city in cash, such persons should be allowed to recover the price or value of the property by collecting the revenues of the markets, as fixed and regulated by the city, during a certain number of years. In other words, they are lessees who give the property in consideration of their leases, instead of paying a fixed amount per annum or a proportion of the revenue. The validity of a contract such as that described has been affirmed by this court in the following terms, to wit: "A municipal corporation has the power to contract with an individual to authorize him to build a market house, rent stalls, and collect dues during a specified period, with the consideration that the land, which is his property, and the improvements upon it, shall be conveyed to the city, and that the same at the expiration of the term shall be turned over, absolutely, in good order, to the corporation. The land and constructions become municipal property at the signing of the contract, and the ownership becomes absolute at the expiration of the time, in the city. The market thus put up is a public market, and any private market found within the prohibited distance of six squares from it is there kept in violation of law." State v. Natal, 41 La. Ann. 887, 6 South. 722; Same v. Gisch, 31

Same—Authority to Build Markets and Collect Revenue.

La. Ann. 544; Same v. Sarradat, 46 La. Ann. 700, 15 South. 87, 24 L. R. A. 584; City of New Orleans v. Kientz, 52 La. Ann. 950, 27 South. 344. Judge Dillon refers to the case of Le Claire v. City of Davenport, 13 Iowa, 210, in which, overruling City of Davenport v. Kelley, 7 Iowa, 102, it was held that a corporation invested by its charter with power "to erect market houses, to establish markets and market places, and to provide for the government and regulation thereof," was authorized to pass an ordinance delegating to individuals the right to erect market houses and to charge rent for the stalls, without reserving to itself the control of the same, and he dissents from that doctrine. 1 Dill. Mun. Corp. (4th Ed.) § 385. But neither he nor any writer, nor any adjudged case, so far as we are informed, questions the authority of a corporation having the power to regulate markets to farm them out, provided the control of the rates charged and of the markets is reserved to the corporation. The counsel for the defendant, in arguing that the provisions of the city charter of 1870 authorizing the city to establish markets and to farm out the revenues thereof have been repealed by the charters of 1882 and 1896, and in referring to the latter acts as governing the validity of the ordinances, which are in evidence, authorizing the building of markets by individuals, have apparently lost sight of the existence of Act No. 116 of 1888, which they nevertheless invoke in behalf of their client, and which does not appear to be in conflict with, and hence does not appear to have been repealed by, either of the acts last above mentioned. State v. Natal, 39 La. Ann. 439, 1 South. 23. The right of the city of New Orleans to farm out the market has, however, always been recognized as resulting from provisions more general than those contained in the acts of 1882 and 1896, and, in the case of State v. Natal, 41 La. Ann. 7, 6 South. 722, it was held to have been included among the powers conferred by the charter of 1856 as "necessary for the proper administration of a municipal government."

It is said that it is the purpose of the ordinance which is complained of to force the defendant into one of the markets last above referred to, or into a market operated by the city, in order to create a monopoly in favor of the grantee of such market, or to increase the revenue of such grantee or the city. The answer to this is that the establishment of public markets and the prohibition of private markets are within the legislative discretion, and the exercise of such discretion cannot be inquired into by the courts, unless the lawmaker has exceeded his power, or fraud is imputed, or there is a manifest invasion of private right. That neither the state, in the adoption of Act No. 34 of 1900, nor the city, in the adoption of Ordinance No. 312, N. C. S., have exceeded their powers, respectively, is perhaps sufficiently evident from what has already been said and from the authorities

More than 50 years ago, Chief Justice Eustis, as the

organ of this court, said, "The right to establish markets is a branch of the sovereign power, and the right of regulating them is necessarily a power of municipal police;" citing 1 Bl. Comm. p. 274; 1 Domat, Droit Pub. § 3; First Municipality v. Cutting, 4 La. Ann. 336. And as far back, almost, as our jurisprudence goes, there are reported cases between the city of New Orleans and the farmers for the markets, or of the duties imposed upon vendors of provisions. Griffon v. Mayor, etc., 5 Mart. (N. S.) 279; Mayor, etc., v. Peyroux, 6 Mart. (N. S.) 155. "But," asks the learned counsel for the defendant, "why is it within the legislative discretion to deal with persons engaged in the lawful business of private market keeping, otherwise than with those engaged in any other lawful business, and do we not reach the limit of legislative power before reaching the point at which such business is suppressed?" The answer to this, we think, is also to be found in the authorities cited. There are certain trades and occupations which, for various reasons, by consensus of opinion among all civilized peoples, fall within what is called the "police power," and the reason for their doing so is so deepseated as to have become a matter of law as well as of fact. Quoting again from an author who has already been referred to, he says, speaking of police regulations: "The instances of this kind of regulation are very numerous. Slaughter houses have been confined to certain localities. The sale of fresh meat and vegetables has been prohibited, except in the public markets, where the article exposed for sale may be conveniently inspected. In the same way may the manufacture of pressed hay, the maintenance of dairies, the cultivation of land within the limits of a town, and the storage of cotton and of other combustible material, such as oil and gunpowder, be prohibited in the densely-settled parts of the city, and the prosecution of such trades be confined to less dangerous localities. In the same way," etc. · 2 State & Fed. Cont. Pers. p. 740. It follows from this that the question whether it is advisable, from a sanitary point of view, to restrict the sale of fresh meat and vegetables in New Orleans to markets which are controlled by the government, and which are subject to police inspection, is not one which, for the purposes of a case pending in court, can be affected by the opinion of this individual or that one, since, as a matter of law and of settled jurisprudence, it is a question the determination of which, from the foundation of the state, and under the dominion of seven constitutions, has uniformly been held to belong to the legislative department of the government. If it were shown, as is claimed by the defendant, that the purpose and effect of the ordinance under which he is prosecuted is to establish a monopoly, the courts, by the terms of the act authorizing said ordinance, and under the constitution, might come to his relief. But the fact that all dealers in the commodities specified in the ordinance may be obliged to transact their business in the public markets is not the estab-

lishment of a monopoly, within the meaning either of the act in question or of the constitution, since the markets are open to them all, upon the same terms, and the charges are regulated by law. It might with equal propriety be said that the state or city enjoys a monopoly in exercising any other governmental function, as in the administration of the wharves or of the system of quarantine; and the claim would be well founded in a limited sense, but not, as we apprehend, in the sense in which the term is used in the argument which we are now considering. How far this court would feel authorized to interfere, upon a claim, supported by evidence, that the revenues derived from the markets are larger than are necessary for their maintenance, is a matter which need not be considered, as we find no such evidence in the record. Judgment affirmed.

NOTES.

Public Markets—Power of City to Regulate.—A city may, under the power to regulate markets, adopt such regulations as are necessary for the preservation of peace and good order and health of the city, but these regulations must be of a police and sanitary character, and not an attempt to restrain trade under the color of regulating it. Caldwell *v.* Alton, 33 Ill. 416, 85 Am. Dec. 282; Peoria *v.* Calhoun, 29 Ill. 317; Bloomington *v.* Wahl, 46 Ill. 489; State *v.* Garibaldi, 44 La. Ann. 809; State *v.* Leiber, 11 Iowa 407; Philadelphia *v.* Davis (Pa.), 6 Watts & S. 269; Blanchard *v.* Ivers, 40 Fla. 117.

Same—Prohibition of Sales Outside Public Markets.—The authority to establish and regulate markets falls within the police power of the states, and the right to exercise such authority may be conferred by a state upon municipal corporations; and it is competent for these corporations, where the delegation of power is sufficient, to prohibit the sale of marketable articles outside of the regularly established markets. City of Bowling Green *v.* Carson, 10 Bush (Ky.) 64; First Municipality *v.* Cutting, 4 La. Ann. 335; *Ex parte* Byrd, 84 Ala. 17; Shelton *v.* Mobile, 30 Ala. 540; Winnsboro *v.* Smart, 11 Rich. L. (S. Car.) 551; Newson *v.* Galveston, 76 Tex. 559; St. Louis *v.* Weber, 44 Mo. 549; St. Louis *v.* Jackson, 25 Mo. 37; Buffalo *v.* Webster, 10 Wend. (N. Y.) 100; Brooklyn *v.* Cleves (N. Y.), Hill & D. Supp. 231; Bush *v.* Seabury, 8 Johns. (N. Y.) 418; State *v.* Pendergrass, 106 N. Car. 664; Ash *v.* People, 11 Mich. 347; Bodkins *v.* Robinson, 53 Ga. 613; Morano *v.* New Orleans, 2 La. 217; First Municipality *v.* Devron, 4 La. Ann. 278; Cangot *v.* City of New Orleans, 16 La. Ann. 21; Yates *v.* City of Milwaukee, 12 Wis. 673; Smith *v.* City of Newbern, 70 N. Car. 19; Wartman *v.* City of Philadelphia, 33 Pa. St. 209.

But see cases cited holding contrary doctrine. Bethune *v.* Hughes, 28 Ga. 500; Bloomington *v.* Wahl, 46 Ill. 489; Caldwell *v.* Alton, 33 Ill. 416; State *v.* Blaser, 36 La. Ann. 363; St. Paul *v.* Laidler, 2 Minn. 190.

Same—Same.—The question whether or not the grant of power to "establish and regulate markets" implies, when standing alone, authority to prohibit, elsewhere than at duly established markets, the sale of articles falling within the exercise of the police power, is answered

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in the affirmative by the following authorities: Bush *v.* Seabury, 8 Johns. (N. Y.) 327; Village of Buffalo *v.* Webster, 10 Wend. (N. Y.) 100; Cronin *v.* People, 82 N. Y. 318; *Ex parte* Canto, 21 Tex. App. 61, 57 Am. Rep. 609; *Ex parte* Byrd, 84 Ala. 17; Morano *v.* Mayor, etc., 2 La. 217; City of Bowling Green *v.* Carson, 10 Bush (Ky.) 64; Winnsboro *v.* Smart, 11 Rich. (S. Car.) L. 551; Ash *v.* People, 11 Mich. 347; St. Louis *v.* Weber, 44 Mo. 547.

Same—Same.—A municipal ordinance which prohibits the sale of marketable articles elsewhere than in the market during market hours, is an exercise of the police power of the city and has been held valid in the cases cited. *Ex parte* Byrd, 84 Ala. 17; Shelton *v.* Mobile, 30 Ala. 540; Le Claire *v.* Davenport, 13 Iowa 200; Davenport *v.* Kelly, 70 Iowa 102; Bowling Green *v.* Carson, 10 Bush (Ky.) 64; State *v.* Gisch, 31 La. Ann. 544; New Orleans *v.* Stafford, 27 La. Ann. 417; Gossigi *v.* New Orleans (La.), 4 So. Rep. 15; St. Louis *v.* Webber, 44 Mo. 547; St. Louis *v.* Jackson, 25 Mo. 37; Dunham *v.* Rochester, 5 Cow. (N. Y.) 462; Bush *v.* Seabury, 8 Johns. (N. Y.) 418; Buffalo *v.* Webster, 10 Wend. (N. Y.) 99; Winnsboro *v.* Smart, 11 Rich. (S. Car.) 551; *Ex parte* Canto, 21 Tex. App. 61.

Where a municipal corporation is authorized to license and regulate the sale of meats and vegetables, a regulation, which prohibits the keeping of a stall outside the public market, without a license, is valid. Ash *v.* People, 11 Mich. 347.

And in some cases it has been held that a power to regulate and manage markets, is sufficient to uphold an ordinance prohibiting the sale of meats elsewhere than in the public market. *Ex parte* Byrd, 84 Ala. 17; *Ex parte* Canto, 21 Tex. App. 51. But see *contra*: Bethune *v.* Hughes, 28 Ga. 560; Burlington *v.* Dankwardt, 73 Iowa 170; City of St. Paul *v.* Laidler, 2 Minn. 190.

Restriction of Sale of Meat, Vegetables, etc.—Regulation of Markets.—A grant to the municipal corporation of power to regulate by ordinance the vending of meat, poultry, fish, fruits, and vegetables, gives authority to prescribe by ordinance the times and places of their sale, and to prohibit the sale of them elsewhere. The restrictions as to such times and places must however be reasonable, with reference to the welfare of the community, and not be in general restraint of trade. Under this grant sales may be restricted, under the same limitations, to markets duly established under a grant of power to establish and regulate markets. City of Jacksonville *et al. v.* Ledwith (Fla.), 32 Am. & Eng. Corp. Cas. 382.

Prohibition of Sale of Fresh Meats Outside Market.—In State *v.* Pendergrass, 106 N. Car. 664, it was held that where the charter of a town gives it authority to regulate markets and to prescribe at what places marketable things shall be sold, the town may enact an ordinance prohibiting the sale of fresh meats within the corporate limits outside of the market house, and may impose a penalty for a violation of the ordinance. The court said: "The legislature unquestionably has, and frequently exercises, the right to regulate trade, as contradistinguished from restraining it; and, while it would not be within the purview of its powers to pass a law prohibiting the sale of sound and wholesome meat in any locality, or permitting the authorities of a town to do so, it

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can confer upon municipalities the power to prescribe by their ordinances the manner of disposing of it, for the purpose of protecting the public health or promoting good government, as by prohibiting it not to be retailed except at designated market places. State *v.* Moore, 104 Cal. 714; Intendant *v.* Sorrell, 1 Jones (N. Car.) 40; State *v.* Chambers, 93 N. Car. 600; Pigeon *v.* Recorders' Court and City of Montreal, 17 Sup. Ct. Can. 495; Newson *v.* Galveston, 76 Tex. 559; Buffalo *v.* Webster, 10 Wend. (N. Y.) 100; Bush *v.* Seabury, 8 Johns. (N. Y.) 327; Winnsboro *v.* Smart, 11 Rich. (S. Car.) Law 552; Bowling Green *v.* Carson, 10 Bush (Ky.) 65; New Orleans *v.* Stafford, 27 La. Ann. 417; St. Louis *v.* Weber, 44 Mo. 549; Wartman *v.* Philadelphia, 33 Pa. St. 209; Ash *v.* People, 11 Mich. 351; Le Claire *v.* City of Davenport, 13 Iowa 210; Palestine *v.* Barnes, 50 Tex. 538; Ash *v.* People, 11 Mich. 347; City of Brooklyn *v.* Cleves (N. Y.), Hill & C. 231; Mayor *v.* Davis (Pa.), 6 Watts & S. 269.

A city has the power to prohibit the sale of meat within a radius of six squares of a public market. State *v.* Natal, 39 La. Ann. 439, 27 Am. & Eng. Corp. Cas. 643; Natal *v.* Louisiana, 139 U. S. 621; Gossigi *v.* New Orleans, 41 La. Ann. 522; New Orleans *v.* Graffina (La.), 27 So. Rep. 590.

By-Laws Must Be Reasonable.—By-laws regulating markets must not be so restrictive as to prevent a frequenter of them from resorting thereto. Wortly *v.* Nottingham Local Board, 21 L. T. 582.

But sales may be limited to perishable articles necessary to the daily support of the inhabitants of the city, and may prohibit the sale of other articles such as groceries, etc. First Municipality *v.* Cutting, 4 La. Ann. 335.

Right of Public in Market.—All persons are entitled to enter a public market for the purpose of buying, but the right to sell is usually confined to stall holders. David's Heirs *v.* New Orleans, 16 La. Ann. 404; Hughes *v.* Farmer's Assoc., 1 Phila. (Pa.) 338.

Private Markets—License.—Keepers of private markets may be required to pay a licence tax although public markets are exempted from such taxation. New Orleans *v.* Dubarry, 33 La. Ann. 481; Kaliski *v.* Grady, 25 La. Ann. 576; City *v.* Kauffman, 29 La. Ann. 283.

Stalls in Market—Mere License.—The right to occupy a market stall pursuant to the permission of the clerk of markets, or of the city, is not a right of property of which the courts can take cognizance, but is merely a license. Barry *v.* Kennedy, 11 Abb. (N. Y.) Pr., N. S., 421. And every seller must be deemed to hold his stand by contract with the city subject to market regulations, and not adversely to its authority. Hatch *v.* Pendergast, 15 Md. 251.

Revocation of License.—A city council has the power to revoke a stall license, for good cause. Charlestown *v.* Goldsmith, 2 Speers L. 428. And an ordinance imposing the collection of a certain sum from stall holders is lawful and may be enforced. City of Cincinnati *v.* Buckingham, 10 Ohio 257.

Ejection of Holder.—A city ordinance is valid which has a provision to the effect that any person holding a stall in a market without the consent of the collector of revenues may be ejected. Donat *v.* Boembay, 15 La. Ann. 377. See also, Pfefferling *v.* Baltimore, 88 Md. 475.

AUCOIN

v.

CITY OF NEW ORLEANS *et al.*

(*Supreme Court of Louisiana, March 5, 1901.*)

[29 So. Rep. 502.]

Defective Streets—Liability of City.*—Where the duty to keep the sidewalks of streets in safe condition rests upon a municipal corporation, and this obligation is not met, is long neglected, and injuries resulting directly from the unsafe condition of the walk occur to a pedestrian, himself exercising ordinary care and caution, the corporation is answerable in damages.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Eugene Aucoin against the city of New Orleans. John Mitchell was cited in warranty by defendant. From a judgment for plaintiff, and a judgment dismissing the call in warranty, the defendant city appeals. Affirmed.

Samuel L. Gilmore, City Atty., and Frank B. Thomas, Asst. City Atty., for appellant.

William J. Hennessey for appellee Aucoin.

Charles H. Brownlee, for appellee Mitchell.

Blanchard, J. This action seeks to recover against defendant the sum of $10,000 for personal injuries sustained by plaintiff in consequence of a defective sidewalk on one of the streets of the city. The accident occurred on a night in December, 1898. It was dark, cold, and wet. Plaintiff was on his way home from a neighboring store. The sidewalk he was traversing was formed of planks. The evidence shows this walk was in very bad condition. The planks were decayed, loose, and out of place. Other persons had fallen there, in consequence, both before and after the accident which overtook the plaintiff. It appears that this bad condition of the sidewalk had existed for a long time prior to the accident. A year previous the city council had passed an ordinance looking to the paving of the same, and due publication thereof, as the charter directs, had been made, but there the matter seems to have stopped. The paving was not laid,

*See City of Circleville *v.* Sohn (Ohio), 1 Mun. Corp. Cas. 50, and *note*, pp. 58, 59.

neither was the walk repaired. The plaintiff was tripped up by one of the loose planks, and fell into the gutter alongside. He sustained severe injuries. His ankle was broken,—a compound, complicated fracture. The bone protruded through his shoe. He was in a helpless condition; unable to proceed; remained there until a passer-by discovered his plight, and, summoning assistance, carried him to his home. A physician was called in, who treated him for several weeks, when, under his advice, the patient was transferred to the Charity Hospital, where two operations were performed, and where he remained for months under treatment. He suffered much, and his injuries are shown to be of a permanent character. It is not made clear whether or not a street light was burning at the corner near by. But, if one was so burning, it was dim and flickering, and gave insufficient light to guide this pedestrian on his way. We find nothing in the record going to show that the plaintiff was not using ordinary care and circumspection. The answer of the city does not even charge him with negligence. It is merely a general denial of the averments of the petition, and the allegation that, if the complainant was injured, it was by reason of the neglect and refusal of John Mitchell, the owner of the property in front of which the accident occurred, to keep in good order and repair the banquette abutting on his premises, as was his duty to do. This John Mitchell is cited in warranty, with the prayer for such judgment in favor of the city over against him as may be rendered (if any) against the city in favor of the plaintiff. The warrantor pleaded the general issue and denied responsibility. There was judgment below in favor of the plaintiff for $2,000, with interest from judicial demand, and dismissing the call in warranty at the city's costs. The latter appeals. In this court the appellee moves for an increase of the amount of the judgment in his favor.

Ruling: The conclusion reached is that on both the facts and the law of the case the plaintiff is entitled to recover. The city of New Orleans is given by its charter full power and control of the streets and sidewalks. Under section 32 of the charter (Act No. 45 of 1896) the street commissioner has general charge of all matters relating to the streets, sidewalks, and pavements, and of the construction and repair of the same; and by section 15 the power is vested in the council to compel the owners of property to keep and maintain in good order and repair the sidewalks in front of their property. For the omission of its duty to keep this sidewalk in good and safe condition, or to compel the abutting owner to do so, the municipality rendered itself liable for resulting injuries, under the circumstances as in this case shown. Turner v. City of Newburgh, 109 N. Y. 301, 16 307, N. E. 344; O'Neill v. City of New Orleans, 30 La. Ann. 220; Cline v. Railroad Co., 41 La. Ann. 1031, 6 South. 851; Blume v. City of New Orleans, 104 La. —, 29 South. 106. The argument of defendant's counsel

that plaintiff might have avoided the accident by taking another route to his home, and that if he had done so he probably would have escaped injury, etc., is, as to the case we are dealing with, well answered in O'Neill v. City of New Orleans, cited supra. The street was open for public travel, and it does not appear that plaintiff knew of its dangerous condition. Without such knowledge or notice, he had a right to assume it offered a safe passage. He was not in the habit of passing along that way. He used that walk only at infrequent periods. A person using a public highway is not bound to anticipate danger, without some notice of a condition of things suggesting a peril of travel. Turner v. City of Newburg, 109 N. Y. 307, 16 N. E. 344.

With regard to the quantum of damages, we will not disturb the amount as fixed by the district judge.

With regard to the call in warranty, if there be legal liability to the city on the part of defendant cited in warranty, there is not a sufficiency of evidence in the record on this branch of the case to warrant passing upon the issue thus raised. But the city's rights as against John Mitchell, whatever they may be, are reserved. Blume v. City of New Orleans, supra. For the reasons given, the judgment appealed from is affirmed.

DETROIT CITIZENS' ST. RY. CO.

v.

COMMON COUNCIL OF CITY OF DETROIT.

(*Supreme Court of Michigan, Feb. 12, 1901.*)

[85 N. W. Rep. 96.]

Review of Assessment of Street-Railway Property—Judicial Notice of Market Value.—In reviewing, on appeal, an assessment of a street railroad, judicial notice will be taken of the fact that it has a large market value, much in excess of any amount that could be obtained for it if dismantled, and its rails, cars, motors, wire, etc., sold separately.

Cash Value of Railroad—Statutory Provision—Method of Assessment.—In determining the cash value of a street railroad, pursuant to Comp. Laws, § 3850, which declares that, in determining cash value, the assessor shall consider the advantages and disadvantages of location, privileges, etc., and the statutory requirement that the track shall be assessed as personal property, the tangible property of the company should be assessed as a unit, and the location of its easements and tracks as to environment, and the period that it may lawfully use it, and other exceptional privileges inseparably connected with it, should be considered in determining its value; thus indirectly taxing its franchise by associating it with the tangible property, and thereby increasing the value of the latter.

Detroit Citizens' St. Ry. Co. *v.* Common Council

Assessors—Board of Review—Assessment Will Not Be Disturbed if Regular.—The determination of assessors and the board of review as to the cash value of property assessed cannot be disturbed if regular, and not fraudulent.

Effect of Assessment as a Unit.—If property may be assessed as a unit, there is no obligation to value its separate elements.

Assessment of Corporations—Statutory Provisions—Void—Double Taxation.—The special provision of Comp. Laws, § 3842, for the assessment of corporations in general, that the value of the stock, less the real estate, should be assessed, as well as the cash value of all personal property, less *bona fide* indebtedness, is unconstitutional and void, since it would result in double taxation if there were no real estate and no debts; and, besides, the provision as to deducting debts is invalid, because it does not conform to the usual method of deducting debts from credits only.

Same—Invalid Provisions Do Not Preclude Taxation under General Method.—Comp. Laws, § 3831, provides that personal property, for purposes of taxation, shall include the various kinds of property described in its 16 subdivisions, including, as provided in subdivision 13, "all other personal property not herein enumerated," and not exempt, but intangible property only is expressly mentioned. *Held*, that the conceded intention to tax, under the method specially provided by section 3842 for the assessment of the property of corporations in general, all property included in section 3831, did not preclude taxation of corporate property under the general method of the latter section on the failure of the method prescribed by section 3842, by reason of its invalidity.

Same—Doctrine of Ejusdem Generis.—The doctrine of *ejusdem generis* does not apply to subdivision 13 above, so as to exclude, for purposes of taxation, intangible property, such as franchises adding to the value of street railroads.

Same.—That a street-railway system consists of several power plants situated at different places along the line, which extends through or into several taxing districts, and also includes a plant outside the city, with which the city board of assessors have nothing to do, is no obstacle to the assessment of the property as a unit, as the legislature may require different portions to be assessed in different places, and a fair division of its value may be made by a mutual understanding between the several assessors.

Exemption from Municipal Taxation by Contract—Necessity for Assessment for State and County Taxes.—That a street railroad is not taxable by the city on account of the city's contract to accept a percentage of the company's earnings in lieu of all other taxes for city purposes does not obviate the necessity of the city's assessing it for state and county taxes.

Same.—Where, pursuant to the organic act under which a street-railroad company was organized, compelling it to submit to such terms as it should be able to make with the city, it agreed to pay to the city a percentage of its earnings, and the city accepted the same in lieu of all other taxes for city purposes, the contract is valid, and relieves the company from such taxes during its continuance, notwithstanding the city at the time of its execution had no right to impose the same, but was thereafter authorized to do so.

Same.—The immunity from taxation under such contract is assignable under section 15 of the street-railway law, authorizing companies to purchase and use and enjoy other railways, and the rights, privileges, and franchises of the companies owning the same, just as the latter might have done.

Power of Legislature in Absence of Constitutional Prohibition.—In the absence of constitutional prohibition, the legislature possesses unlimited power, and may authorize a city to impose or omit specific taxes on street-railroad companies, as it shall see fit in each particular case.

Evidence—Conclusive on Appeal.—There being evidence to support a finding of fact by the trial court, it is conclusive on appeal.

Method of Assessment Immaterial.—Processes by which assessors arrived at the value of a street railroad are immaterial, in so far as they affect the validity of its assessment, if they finally conclude that it is honestly worth in the market in cash the sum assessed.

Appeal—Waiver of Technical Errors.—A street-railroad company having appealed from an assessment to the common council of the city of Detroit, whose charter providing therefor expressly declares (section 168) that no other matter shall be considered besides the grounds specially stated in writing in accordance therewith, the council properly refused to consider a supplemental appeal based on technical irregularities relating only to the jurisdiction of the board of assessors, and which objections so far as appeared were not included in its original protest before it, which raised only the meritorious questions included in the appeal, and hence waived the technical errors which must be regarded as nonprejudicial, and covered by Comp. Laws, § 3922, which attempts to protect the public against such irregularities.

Filing Roll of Assessments.—Filing the roll by the board of assessors of Detroit after the amounts of their assessments were fixed by the board of review is not a compliance with the law, but did not deprive a taxpayer complaining of its assessment of the right of review thereof, the situation having been understood by it, and no objections being made thereto, and it having had an opportunity to be heard on appeal as effectively as though the roll was finished and present.

Board of Review—Notification of Appellant Not Necessary.—The common council of the city of Detroit, acting as a board of review, was not required to notify an appellant to attend when it was considering appeals from the board of assessors, and, if it desired to be heard, it should have been present and requested it.

Certiorari to circuit court, Wayne county; William L. Carpenter, George S. Hosmer, Byron S. Waite, Joseph W. Donovan, and Morse Rohnert, Judges.

Petition for mandamus by the Detroit Citizens' Street-Railway Company against the common council of the city of Detroit. From an order denying the writ, relator brings certiorari. Affirmed.

Brennan, Donnelly & Van De Mark (Henry M. Duffield, H. H. Hatch, and John J. Speed, of counsel,) for appellant.

Timothy E. Tarsney (Allen B. Morse and George E. Nichols, of counsel), for respondent.

Hooker, J. The relator is a corporation organized and operating a street-railway trolley line in the city of Detroit.

Case Stated.

Its railway extends through several wards of the city, and into a township outside of the city. The assessment of values of property for taxation in Detroit is made by a city board, called the "Board of Assessors," its action being subject to review by the common council. This board assessed the relator's property for the year 1900 at something over $5,000,000, its previous assessment having been $800,000 for the year 1898, and $1,500,000 for the year 1899, and the council, professing to act as a board of review, subsequently confirmed the assessment. On May 14, 1900, the relator filed a petition for mandamus in the circuit court, in which it prayed that the respondent, the common council, be required to strike the assessment from the rolls, or, in the alternative, that it be required to reconvene as a board of review, and strike from said assessment certain sums alleged to represent the value placed upon the franchises of the relator, and to place upon the roll the personal property of the petitioner at the actual cash value of its tangible personal property subject to taxation. On the return of an order to show cause issue was joined upon several questions of fact, and, after hearing the testimony, that court, sitting en banc, denied the relief prayed, and the relator has brought the case here.

The circuit court filed written findings of fact, based upon the issues, and an opinion discussing said findings and the law applicable to the case.

Four objections only, made by relator's protest filed with board of assessors, were relied upon in the circuit court, as appears from the opinion: "(1) That the valuation placed on relator's taxable personal property greatly exceeds its true cash value; (2) that there was illegally included in said valuation several million dollars on account of franchises; (3) that no separation was made on the assessment roll of the valuation placed on the franchises and the valuation placed on the tangible personal property of relator; (4) that the property acquired by relator from the Grand River Street-Railway Company is taxable, by virtue of a contract with the city, at one per cent. on its gross earnings, and is not otherwise subject to taxation for city purposes."

The circuit court omitted to determine the first, i. e. whether the valuation exceeded the cash value of the property, upon the ground that a court can only assume to control the judgment of an assessing officer in fixing values where said officer has acted fraudulently. The disposition of the second is shown by the following question: "In fixing the valuation of the personal property of the petitioner, did the board of assessors take into consideration and include the franchises of petitioners, and easements in the nature of franchises, in the streets of Detroit, acquired by petitioner from the Detroit City Railway, and owned and enjoyed by

petitioner, as alleged in paragraph 8 of the petition?" to which the court answered, "Yes; they took into consideration the franchise in the streets of Detroit, as stated in the opinion." Referring to the opinion for a more complete answer, we find it stated that "the franchise which was taken into consideration in valuing relator's personal property was its right to construct, maintain, and operate street railways in the streets of Detroit, and to collect fares from passengers carried thereon." It appears to be conceded that there was no separation upon the roll of the valuation placed upon the franchises from that placed upon the tangible personal property, and that the property was assessed at some $2,000,000 more than the value of the track, rolling stock, etc., disassociated from the easement in the highway and its attendant privileges.

For the purpose of the discussion of the question before us, we will treat franchises as of three classes: First, the right to organize and exist as a corporation; second, the right to act generally as a corporation; and, third, the special privileges granted to it which are not possessed by the individual under general laws. See Chicago Municipal Gaslight & Fuel Co. v. Town of Lake, 130 Ill. 42, 43, 22 N. E. 616.

The first of these is enjoyed by all corporations legally formed, and also by all assuming to be corporations through user. This right to exist as a corporation is not transferable, and therefore cannot be said to have a cash value, in the sense of our statute. Joy v. Road Co., 11 Mich. 164. Cash value and actual value are said to have the same meaning, viz. "the amount at which property would be estimated if taken in payment of a liquidated demand due from a solvent debtor." Weltz, Assessm. § 130, and cases cited.

The term is fixed, however, by our statute (Comp. Laws, § 3850), which provides: "The words 'cash value,' whenever used in this act, shall be held to mean the usual selling price at the place where the property to which the term is applied shall be at the time of assessment, being the price which could be obtained therefor at private sale, and not at forced or auction sale." Apparently the intention was not to tax property having no cash value. If it were transferable, it would seldom be worth more than a nominal price, by reason of the facility with which such corporations may be organized under our general laws, which is the only way that private corporations can be created in Michigan. Const. art. 15, § 1.

Again, franchises of the second class are incident to all corporations, and are manifestly of no more value than the right to exist; for they naturally and impliedly go with it, and are not transferable. Every corporation has by implication authority to acquire and dispose of property, and to carry on business as a private person would do, for the purpose for which the corporation is organized. Joy v. Road Co., *supra*; Stone v. Trust Co., 116 U. S. 307, 6 Sup. Ct. 334, 388,

1191, 29 L. Ed. 636. The third class consists of exceptional privileges—usually, if not always, connected with property—which the citizens generally do not enjoy, and these are frequently of much value. To apply what has been said to the relator: Any number of street-railway companies might be organized under the statute, and they would have the right to exist as lawfully constituted corporations, with the corporate capacity to build and operate street railways anywhere in the state. But the right to build would have to be acquired. Until such a corporation should be able to obtain an easement in some highway,—which the statute does not, of itself, effectuate,—its privileges would be of little, if any, value. But when it should have acquired possession of an easement in a designated highway, for the purposes of a street railway, and constructed and put in operation a railway thereon, the easement and railroad would constitute property.

It seems not to have been the policy of the state to place any price or tax upon the right to exist or act as a corporation until recently. Now a franchise tax is exacted from all newly formed domestic corporations, as well as those of foreign states and countries, which choose to do business within the state. This is in no sense a tax upon property. It is exacted but once, viz. when the company is organized or enters the state to do business, and, in short, is a condition upon which it is permitted to be and to act. The price of these privileges is proportionate to the capital employed. Whether the state might treat these franchises as property, and provide for their assessment on an ad valorem basis, we need not inquire. It has not been done, and there seems to be little inducement for such action, because of the trifling value of the abstract right of corporate existence.

Recurring to the third class, it is noticeable and suggestive that the state has not, in express and certain language, imposed a tax upon franchises as property upon an ad valorem basis. We are of the opinion that the reason is that there is no occasion for it. A fundamental idea in our organic law is equality of taxation. It requires uniformity of method, and prescribes the basis upon which property shall be taxed, viz. "its cash value." There is no more excuse for ascribing a fictitious value to property, whether tangible or intangible, than there is justice in undervaluing or omitting it from the tax roll.

We have attempted to show that special privileges are usually of little more than nominal value, except in connection with tangible property, which makes it possible for the owner—who may be a corporation or a natural person—to avail himself of them. Why, then, should they be taxed in the abstract, and when the owner can neither use them nor sell them? In California v. California Pac. R. Co., 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150, it is said: "The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in

the original charter of the company, is the exercise of an authority somwhat arbitrary in its character. It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose, or, without any value of the franchise at all, the tax may be arbitrarily laid. It is not an idle objection, therefore, made by the company against the tax imposed in the present case." When, however, they are associated with property which makes them available, the property with which they are connected generally takes on a new form in the law, and is enhanced by the privileges and uses to which it is adapted and applied, and pays a correspondingly increased tax, because it has an increased cash value. Any other rule would be full of difficulty.

Private corporations are formed for an infinite variety of purposes, and the fewest of them enjoy exceptional privileges, beyond that of corporate existence. There is no reason for assessing the factory of a manufacturing corporation, the store of a mercantile company, or the farms of an agricultural corporation at a greater sum than similar property belonging to a private person is valued at. The problem is solved by assessing the property of each at its true cash value. Special privileges, unlike the right to corporate existence, have an actual valuation in connection with the property adapted to their use, and are salable with it. See Joy v. Road Co., 11 Mich. 164; Comp. Laws, §§ 6426, 6448, 6449. The practice of taxing the property and the privilege together is nearly or quite uniform. It would be unjust to tax the property at its enhanced value, and also tax the franchise separately, upon some speculative value, arrived at upon the basis of real or imaginary expectancy of profits. Low taxes, fairly and evenly distributed, should be the aim, and the constitution has fixed the rule of valuation at "the cash value," and, as we have seen, the statute has defined the term.

The relator contends that the personal property should be assessed upon the basis of the component parts of the railway system, i. e. a given price per mile for track and overhead construction, an average sum per car, and a certain sum for machinery, all bearing some relation to their cost or the price at which similar articles can be obtained. In fact, the relator claimed upon the hearing below that the tangible property was so valued, and that some $2,000,000 or more was then added for the value of the franchise. The court set the matter at rest, however, by finding that in fixing the value of the personal property the assessors took into consideration and included the franchise in the streets. The right to use the street for a railway is an easement. Detroit Citizens' St. Ry. Co. v. City of Detroit (Mich.) 83 N. W. 104; Gas Co. v. Thunder, 2 R. I. 15; People v. Cassity, 46 N. Y. 49; Board v. Wilkinson, 119 Mich. 655, 78 N. W. 893, 44 L. R. A. 493;

Rascher v. Railway Co., 90 Mich. 413, 51 N. W. 463. This easement becomes a vested property right, and, while there may be a few cases holding that easements not held in fee cannot be separated from the fee for the purposes of taxation, see City of Fall River v. County Com'rs of Bristol, 125 Mass. 567; City of Detroit v. Detroit City Ry. Co., 76 Mich. 427. There are others which hold such an interest taxable as real estate, and the section cited (Comp. Laws, § 3850), defining the term "cash value," also provides that "in determining the value the assessor shall also consider the advantages and disadvantages of location, quality of soil, quantity and value of standing timber, water power and privileges, mines, minerals, quarries, or other valuable deposits known to be available therein, and their value."

If, therefore, the easement were taxable as an interest in land, the nature of the easement, its location, uses, and productiveness, may, by the express terms of the statute, be taken into consideration in determining the cash value. The individuality of the elements of the road as chattels, i. e. spikes, rails, ties, poles, wire, etc., has become lost, as in other cases of fixtures, by being transformed into other property, the value of which is to be determined by relation to that kind of property, and not to spikes, ties, rails, etc., just as fine furniture is valued in comparison to similar articles, and not with similar materials to those entering into its construction.

It is obvious that the relator's property is worth much more as a street railway, equipped and in successful operation, than the elements which enter into its construction would be as secondhand railway material. It may be worth much more than what it would cost to reproduce the physical aggregation of property constituting such railway and its equipment, and circumstances might exist which would make it worth less. The propriety of treating aggregations of property as a unit is as natural and proper for the purposes of assessment as for sale, and this is especially so where the various articles are so essential to the purpose for which they are combined that the withdrawal of one or any class would destroy, or substantially impair, the use of all for the purposes to which in their new form they are adapted.

Review of Assessment of Street Railway Property—Judicial Notice of Market Value.

We may take judicial notice that the relator's street railroad has a large market value, much in excess of any amount that could be obtained for the same if it were to be dismantled, and its rails, cars, motors, wire, etc., sold separately. In such a case it would practically go as junk. Again, the easement of a steam railroad in a continuous right of way through the state, over a desirable route, and in use, has a much greater value than the same kind of a right not in use, or in small, disconnected parcels, or in a remote region, where it cannot be used profitably. Manufacturing establishments and large buildings, favorably located and adapted to special

uses, illustrate the same principle, and we think it is incorrect to say that the recognition of this principle, and its consideration in assessment, is taxing the good will of a business, which, like executory contracts, has not, usually, been thought to be taxable. People v. Dederick, 161 N. Y. 195, 55 N. E. 927; Chittenden v. Witbeck, 50 Mich. 401, 15 N. W. 526.

The legislature has provided that the track (whatever that may mean) shall be assessed as personal property. In our opinion, this term should be construed to include not only the ties, spikes, rails, and switches, but also the right to use the bed upon which they are placed. See Detroit City Ry. Co. v. City of Detroit, 76 Mich. 428. And although the bed, i. e. the highway, is under the control of the public, and the right to use it is an easement and interest in land, the state may treat it as personal property for assessment, even if it would be otherwise considered real estate,—a proposition that we find it unnecessary to assert.

No good reason is suggested for assessing a street railway or any other property for less than it would readily sell for. This railroad has for years been assessed for a sum small in comparison with the assessment complained of, but if it be true that former assessments have not included the track, and have been based solely upon the value of certain items of construction, such assessments may have been much too low. The propriety of assessing such property as an entirety is well supported by authority.

Mr. Elliott, in his work on Railroads, advocates it in the following language: "The best method of taxing the property of a railroad company forming part of its line and used in the operation of its road is by regarding it as a unit, and assessing the property as an entirety, since any other method would dissect the property into fragmentary parts, and lead to confusion and injustice. Some of the courts hold that the property can only be taxed as an entirety." 2 Elliott, R. R., No. 737, and note.

This subject was discussed in Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 220, 41 Sup. Ct. 683, 41 L. Ed. 965. That case was complicated by questions relating to interstate commerce, the corporate business extending into and over several states. Yet the court asserted the propriety of taxation by the states, and admitted the power to assess as a unit and to levy taxes upon an aliquot part of such assessment valuation. The case is valuable also upon the question which we have before alluded to, viz. the elements which go to make up the aggregate value of the unit, and the doctrine was carried much further than is necessary in this case by applying it to an express company, which owned no easements, and had no special privileges that any private citizen does not enjoy, and whose only property consisted of articles in common use by individuals, but which, treated as a unit, were susceptible of being made the means of realizing enormous profits, and

probably, as a whole, worth in the market much more than the integral parts of such unit, for the purpose of sale. Whatever may be thought of the effect of this case upon the right to tax the good will of a business, or the ability of the owner of property to use it to extraordinary advantage, which we find it unnecessary to approve, we consider it a strong support to the doctrine that the tangible property of a street-railway company may be assessed as a unit, and that the location of its easement and tracks as to environment and the period that it may lawfully use it, and other exceptional privileges inseparably connected with it, may be considered in determining the value of such property; or, in other words, the assessor must not eliminate them by making reductions in the clear value of the entire plant. Unlike the good will of a merchant, which is ephemeral, these are part and portion of the right to make any use of the property for the purpose to which, in its new form, it is adapted. Its value may be increased much or little, depending upon the opportunity for using it; just as the value of a modern sawmill may depend upon the presence or absence of accessible timber.

Mr. Justice Cooley, in his work on Taxation, intimates the same opinion as that quoted from Elliott. He says: "The difficulties of assessing lines of railroad which extend through many municipalities in the same way that property in general is assessed are so great and so obvious that in many states it is not attempted, and a franchise tax is imposed as a substitute for all other taxation. But in other states a railroad is listed, assessed, and valued as an entirety, and the value then apportioned for taxation between the several municipalities by some standard prescribed by law, which generally is the length of line within the municipalities respectively. There is no constitutional objection to this method of taxing this species of property, and it is, perhaps, more just than any other. In some states the assessing board apportions the aggregate value between the municipalities according to the estimated value of that portion of the road, with its improvements, lying within the limits of each; and in still others the roadbed, right of way, and superstructure are assessed as a whole, while the buildings and local improvements are left to be assessed locally, like the property of natural persons. * * * Where a road is thus to be assessed as a whole, bridges, tunnels, easements in and over streets, and other things, and rights of a like nature, are to be taken into account, and are not subjects of separate assessment; while property not held or used for railroad purposes, but of which the corporation may have become owner, should be separately listed and taxed, unless the statute plainly makes a different provision. * * * In other states still, the local assessors are left to list and value such railroad property as is with their jurisdiction, including such portion of the roadbed and superstructure as lies within their municipality, in the same manner as they would any other property.

In valuing railroad property it must be estimated by the same standards as other property is valued by."

In Railroad Co. v. Bate, 12 Lea, 581, it was held that the roadbed, franchise, and superstructure of railroads are so essentially intermingled, and each so indispensable to the value of the others, that they should be assessed together. This is under a statute declaring that "the roadbed, rolling stock, franchise, etc., shall be known as distributable property," and may account for the remark in the case of Railroad Co. v. Morrow, 87 Tenn. 406, 11 S. W. 348, that "the franchise to be a corporation is property, and as such must be assessed." It is noticeable that this case, which in this respect goes further than we find it necessary to do, holds that privileges ought to be assessed with the tangible property, and adds, "Here it has been assessed along with a valuable easement,—an interest in realty." We are in accord with the conclusion, and, had the court said that the exceptional privileges, instead of the right to be a corporation, were to be considered property, and taxed, we might think it correct, even had the franchise been separately assessed under the statute of Tennessee directing the assessment of franchise as property. Railroad Co. v. Bate, 12 Lea, 573.

In Railroad Co. v. Morrow, supra, the franchise was assessed with the easement, and this was sustained, though it was said that "it would have been better to have assessed these elements of value, with the iron rails, ties, spokes, etc., as together constituting so much street railway."

The case of Chicago City Ry. Co. v. City of Chicago, 90 Ill. 573, holds that the easement in the streets, which had been granted (though not in fee), and by which the company had acquired rights in the street which no other person or company nor the public possessed, was taxable.

In Rascher v. Railway Co., 90 Mich. 413, 51 N. W. 463, it was said that the right of way of defendant was an easement.

In City of Grand Haven v. Grand Haven Waterworks, 119 Mich. 654, 78 N. W. 890, a tax upon water pipe in the ground as personalty was held void, thereby perhaps implying that it was an interest in land, and that the easement and its fixtures should be assessed together, if assessable at all.

In Detroit Citizens' St. Ry. Co. v. City of Detroit (Mich.) 83 N. W. 104, it was held that a conveyance of an easement for a street railway was an interest in land. See cases there cited. It is none the less an interest in land because not a freehold interest, nor because the legislature may have expressly directed its assessment as personalty; nor should we infer from the latter fact that the track—i. e. the rails, ties, etc.—must be assessed separately, and that the easement cannot be taxed at all. We think the legislature had no such intention. In People v. Commissioners of Taxes & Assessments of the City and County of New York, 23 Hun, 687, it is said: "A street railroad company cannot be taxed for its tunnels and

bridges, but it may be taxed for the easement acquired on the streets, and the easement is to be assessed at its fair value, as a portion of a continuous railroad. The foundation columns and superstructure of an elevated railway are included in the words 'lands and real estate,' and are taxable as such; and in assessing such foundations and superstructure assessors are not confined to the consideration of the land covered thereby, but may consider their position, and the business and profits to be derived therefrom. An easement of a railroad upon lands and its tracks and other appurtenances are land within the meaning of the statute relating to taxation, and are to be assessed at their par value, as a portion of a continuous railroad, extending beyond the city limits."

In the case of Railroad Co. v. Backus, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031, Mr. Justice Brewer quoted with approval the language used in Franklin Co. v. Nashville, C. & St. L. Ry. Co., 12 Lea, 521, to the effect that: "The value of the roadway at any given time is not the original cost, nor, a fortiori, its ultimate cost after years of expenditures in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands, and adding the value of the cross-ties, rails, and spikes. The value of land depends largely upon the use to which it can be put, and the character of the improvements put upon it. The assessable value for taxation of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic as evidenced by the rolling stock, and the gross earnings in connection with its capital stock. * * * Counsel sought in argument to narrow the meaning of the words 'railroad track' and 'rolling stock,' as though the two did not include the entire railroad property; but evidently the supreme court of the state construed, and, as we think, properly, the two terms as embracing all which goes to make up what is strictly railroad property. * * * Obviously it was assumed by that court * * * that by these two descriptive terms the legislature, carrying out the declared purpose of subjecting all property within the state to taxation, not expressly exempted, meant to include all the property owned or used by the railroad companies in the operation of their roads, and which may fairly be called 'railroad property.' And when the statute provides that such property shall be assessed at its 'true cash value' it means to require that it shall be assessed at the value it has as used, and by reason of its use."

In Pullman Palace-Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613, it was said: "It may be well doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length

to the whole. This court has expressly held in two cases, where the road of a corporation ran through different states, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each state, as the basis of taxation. In re Delaware R. Tax, 18 Wall. 206, 21 L. Ed. 888; Erie R. Co. v. Pennsylvania, 21 Wall. 492, 22 L. Ed. 595."

The language of Fuller, C. J., in the case of Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683, is pointed in support of the propriety of assessing such property as a unit. He said: "No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons, and furniture than that of railroad, telegraph, and sleeping-car companies to roadbeds, rails and ties, poles and wires, or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches, and furniture, the contracts for transportation facilities, the capital necessary to carry on the business,—whether represented in tangible or intangible property,—possessed a value, in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others. We repeat that, while the unity which exists may not be a physical unity, it is something more than mere unity of ownership. It is a unity of use, not simply for the convenience of pecuniary profit of the owner, but existing in the very necessities of the case, resulting from the very nature of the business. * * * The property of an express company, distributed through different states, is an essential condition of the business united in a single specific use. It constitutes but a single plant, made so by the very character and necessities of the business. It is this which enables the companies represented here to charge and receive within the state of Ohio for the year ending May 1, 1895, $282,181, $358,519, and $275,446, respectively, on the basis, according to their respective returns, of $42,065, $28,438, and $23,430 of personal property owned in that state,—returns which confessedly do not, however, take into account contracts for transportation and accompanying facilities. Considered as distinct subjects of taxation, a horse is indeed a horse; a wagon, a wagon; a safe, a safe; a pouch, a pouch. But how is it that $23,430 worth of horses, wagons, safes, and pouches produces $275,446 in a single year, or $28,438 worth $358,519? The answer is obvious. * * * Neither does the fact that the property of the express companies was valued as a unit profit-producing plant violate any federal restriction upon the taxing power of a state within which a part of that plant is found. The value of the property depends in a large degree upon the use to which it is put. If a railroad may be valued as a unit, rather than a given number of acres of land, plus so many tons of rails,

and so many thousand ties, and a certain number of depots, shops, etc., there is no sufficient reason why the property of an express company should not be treated as a unit plant. * * * We are also unable to conclude that the classification of express companies and railroad telegraph companies is subject to the unit rule denies the equal protection of the laws. The provision of the fourteenth amendment 'was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways,' nor was the amendment 'intended to compel a state to adopt an iron rule of equal taxation.' * * * Considering, as we do, that the unit rule may be applied to express companies without disregarding any other federal restriction, we think it necessarily follows that this law is not open to the objection of denying the equal protection of the laws."

Mr. Justice Brewer, in Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965, thus pungently shows the justice of the assessment of the unit inclusive of the intangible rights, which swell the value of tangible articles which enter into the property. He said: "Whenever separate articles of tangible property are joined together, not simply by unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this intangible property must be excluded from the tax lists, and the only property placed thereon the separate pieces of tangible property? * * * To the owners thereof, for the purpose of income and sale, the corporate property is worth hundreds of thousands of dollars. Does substance of right require that it shall pay taxes only upon the thousands of dollars of tangible property which it possesses? Accumulated wealth will laugh at the crudity of taxing laws which reach only the one and ignore the other; while they who own tangible property, not organized into a single, producing plant, will feel the injustice of a system which so misplaces the burden of taxation. * * * What a mockery of substantial justice it would be for a corporation, whose property is worth to its stockholders, for the purpose of income and sale, $16,800,000, to be adjudged liable to taxation upon only one-fourth of that amount. The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income for purposes of sale." See, also, Fond du Lac Water Co. v. City of Fond du Lac, 82 Wis. 329, 52 N. W. 439, 16 L. R. A. 581; Yellow River Imp. Co. v. Wood Co., 81 Wis. 554, 51 N. W. 1004, 17 L. R. A. 92; W. U. Tel. Co. v. Attorney General of Commonwealth of Massachusetts, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; State v.

Anderson (Wis.) 63 N. W. 746. For other cases see brief of counsel.

The authorities are substantially uniform in support of the propriety of assessing public utilities, such as railroads, waterworks, telegraph lines, etc., as units. It is contended, however, that if a franchise—i. e. an intangible license to do an exceptional business—is not made taxable property by express statute, it cannot be taxed indirectly by associating it with tangible property, thereby increasing the valuation of the latter. We think otherwise, and think it clear that property should be taxable at its cash value, whatever it may be that causes the value. If, as is claimed, this property is worth, and would bring, with the franchises that are inseparable from and necessarily go with it, somewhere from ten to fifteen million dollars, its owners have no right to expect it to be taxed on a basis of one and one-half million dollars; and we feel confident that the legislature never contemplated a construction of the tax law that should justify it. Whether the property is worth such a sum is not for us to decide. That question is for the assessors and board of review, and, as held by the learned circuit judges, their determination cannot be disturbed, if regular, and not fraudulent.

Cash Value of Railroad—Statutory Provision—Method of Assessment.

Assessors—Board of Review—Assessment Will Not Be Disturbed if Regular.

We have endeavored to show that, whatever may be the rule as to the assessment of privileges in the abstract, not connected with tangible property, the latter may be assessed for what it is worth, without reference to the cause of such value, and without analysis to see if some intangible element of value does not enter into it, which should be eliminated upon the theory that intangible things are not taxable. We have shown that this court has held "the right to use tracks is inseparable from the franchises, and, not being taxable as land, it should properly be taxed as an entirety to the corporation in one place." City of Detroit v. Detroit City Ry. Co., 76 Mich. 428, 43 N. W. 447. It would seem that we might treat this case as decisive upon the question of assessing as a unit both the track and the privileges of making exceptional use of the highway. We will, however, take up the subject of our statutes, which are alleged to preclude the idea that franchises may be treated as property for the purposes of assessment. Attention has already been called to the provision that property shall be assessed at its true cash value. And we have intimated our opinion that the right to be a corporation and the possession of the incidental and necessary functions of corporations were not designed to be taxed, because they have no cash value under the statute, if for no other reason. We have not found it necessary to hold that a naked right to avail itself of exceptional privileges was taxable as corporate property. We do not pass upon that question. We have also referred to the statute which expressly recognizes the principle

that the environment property may affect its value. We may, at this point, mention the claim of counsel that the relator was entitled to be informed of the items of the valuation. If the property was to be assessed as a unit, there was no obligation to put separate values on the elements. Section 3831 provides that "for the purposes of taxation, personal property shall include." Then follows in 16 subdivisions the description of various kinds of property, and subd. 13 is as follows: "All other personal property not herein enumerated, and not especially exempted by law." It is contended: First, that franchises are not expressly mentioned, and that we should apply the doctrine of ejusdem generis, and consider them excluded, because the section mentions only tangible property; second, that provision is made by section 3842 for the taxation of corporate property in another way; and, third, if section 3842 shall be found invalid, it is evident that it was not the intention of the legislature to tax corporate franchises under section 3831, and therefore these franchises cannot be taxed at all.

Effect of Assessment as a Unit.

We are satisfied that section 3842 is unconstitutional and void, because it provides for doubly taxing the property of corporations. As shown by the opinion of the circuit judges, the value of the stock less the real estate was assessable, and the cash value of all personal property, less bona fide indebtedness, was assessable. If there should be no real estate, and no debts, the entire property of a corporation would be taxed twice, as personal estate; and, if there were real estate, all of the property would be taxed twice, part as real estate and part as personal property, if there were no debts. Again, the provision for deducting debts from personal property would be invalid because not uniform with the usual method of deducting debts, viz. from credits only. We cannot, however, sustain the claim that franchises cannot add to value because of the suggestion that the intention was to tax under section 3842, and not under section 3831. Section 3842 shows an intention to tax corporations upon all property covered by section 3831. There is no intimation that anything was to be omitted. It prescribed a method for ascertaining the amount at which a company should be assessed. That method failing, the assessor is left to the general provisions, or the property cannot be assessed at all. No one seems to have claimed the latter effect of the invalidity of the statute. We are satisfied that the property of the relator is taxable under section 3831. Now, as to the doctrine of ejusdem generis. Some kinds of property called intangible are taxable,—such as contract rights of annuity, royalty, credits of every kind. There is ground for the argument that every kind of property that has a cash value is taxable under section 13, and that intangible property is not excluded, some

Assessment of Corporations—Statutory Provisions—Void—Double Taxation.

Same—Invalid Provisions Do Not Preclude Taxation under General Method.

Same—Doctrine of Ejusdem Generis.

of these other kinds of intangible property being included. But there are many other kinds of intangible property—such as rights of action, and of contracts executory in character—that have never been supposed to be taxable. Some of these have a purely speculative value, and some are more certainly valuable. These, like the right to exist as a corporation, are not taxable. It may be that we should say the same of naked privileges, if it were necessary to decide the question. But tangible property is taxable, and the intangible rights of use and location may increase its value for the purposes of taxation. Such seems the consensus of opinion in other states, and such seems to have been the understanding of the legislature, as appears from section 3850, if there is anything in analogy.

Having determined that there is nothing to prevent property of this character from being assessed as a unit, we should inquire whether there is any reason peculiar to this particular property to prevent it. It is urged that a practical construction has been given to the tax law, and that it has not been the custom in this state to tax property as a unit, and to permit privileges and franchises to enhance its value. We do not so understand the fact. We have supposed that manufacturing institutions, electric and gas lighting companies, and waterworks were taxed at their full cash value, and that the right to use the mains, poles, wires, etc., in the streets was included, as without these the value would be comparatively small. In further support of the claim that the franchises should be included, see State Board of Assessors v. Central R. Co., 48 N. J. Law, 146, 278, 4 Atl. 578; Belleville Nail Co. v. People, 98 Ill. 399; Fall v. Mayor, etc., 19 Cal. 391; Central Pac. R. Co. v. State Board of Equalization, 60 Cal. 35; Fond du Lac Water Co. v. City of Fond du Lac, 82 Wis. 322, 52 N. W. 439, 16 L. R. A. 581. We understand it to be conceded by at least one of the briefs for relator that "this license or easement in the street is inseparably connected with the track, etc., of the company, and neither it nor the track can be assessed separately, but must be valued together;" citing State v. Anderson, 90 Wis. 550, 63 N. W. 746; City of Detroit v. Detroit City Ry. Co., 76 Mich. 428, 43 N. W. 447; People v. Mutual Gaslight Co. of Detroit, 38 Mich. 155.

It is suggested that there are insuperable obstacles in the way of an assessment of this property as a unit, inasmuch as the street-railway system consists of several power plants, situated at different places along the line, which extends through or into several taxing districts; and, although the assessments are made by the city board of assessors for most of these, there is one that is outside of the city, with which this board has nothing to do. While it is true that a more satisfactory and just method would be to have the entire property assessed and apportioned among the districts by one board, this is not indispensable. The

Same.

legislature has power to require different portions to be assessed in different places, and there is nothing to prevent a fair division of the value of the property by a mutual understanding between the several officers, if not in some other way. In the case of Express Co. v. Ohio State Auditor, supra, a board in the state of Ohio placed a valuation upon corporate property as a unit, although the property was not all within that state, and took an aliquot part of this as a basis for assessment. If Ohio could lawfully do that, so could Pennsylvania, and Virginia, and Kentucky; and it would seem no more difficult in the case before us than in that instance.

Another reason given for the claim that at least a portion of this property was not subject to this assessment rests upon an ordinance of the city of Detroit. It arises upon the fourth objection, already stated, viz. that the Grand River Street-Railway Company, to whose rights the relator has succeeded, is taxable, under a contract with the city, at the rate of 1 per cent. on its gross earnings, and that this is in lieu of all other taxes for city purposes. There is nothing in this which does away with the necessity of valuing the property, as it is necessary for the purposes of state and county taxes (City of Detroit v. Detroit City Ry. Co., 76 Mich. 425, 43 N. W. 447); but the question is likely to arise upon an attempt being made to spread or collect the city tax, and, as it is discussed, we dispose of it here. To understand the question, we must advert to the history of the transaction. We take this mainly from the relator's brief. On August 26, 1868, a number of persons organized a corporation under an act then in the statutes known as the "Tram-Railway Act," and called it the "Grand River Street Railway." In November, 1868, the common council of the city of Detroit passed an ordinance granting to the Grand River Street Railway some privileges and rights. Section 4 provided that the railway should keep certain portions of the streets in good order and repair, and free from snow, ice, etc., and, inferentially at least, required it to pave the same. Section 22 required it to pay annually to the city treasurer, after the expiration of five years, $15 on each car used, "to be collected as a license for the use of the city." This remained in force until November 14, 1879. At the time of the organization, and when the ordinance was passed, the tram-railway act provided for the payment of a special tax of one-half of 1 per cent. of the paid-up capital stock, to be in lieu of all other taxes. This was payable to the state. There was a similar provision in the street-railway law passed in 1867. Both were repealed in 1882. By reason of this the city could collect no tax while that provision continued in force, except the license mentioned in the ordinance, which we understand to have been paid without objection; but in 1879 a conference between the company and a committee of the council was held, and a report was made by the

Exemption from Municipal Taxation by Contract—Necessity for Assessment for State and County Taxes.

committee, with a proposed ordinance, which was afterwards passed. It was as follows: "In lieu of license fee and tax and of the existing charges for paving and street supervision, the company should pay into the city treasury a specific tax of one per cent. per annum on their gross receipts, and should pay the entire cost of materials for, as well as the cost of excavating, grading, and paving, renewing, repairing, and cleaning the roadway spaces which constitute their track, as the council may require, only reserving to the company the portion used on the surface of their roadways, either cobblestone or some similar durable and proper materials."

After the repeal of the tram-railway law, in 1882, the city undertook to impose ad valorem taxes upon the company in addition to the 1 per cent. provided by the ordinance, and litigation followed, which continued until a new ordinance was passed and accepted, reading as follows: "From the 1st day of July, 1882, to the 31st day of December, 1896, said railway shall pay to the city treasurer one and one-half per cent. of its gross receipts; from the 1st day of January, 1897, to the end of its franchise under the ordinance approved November 14, 1879, said railway shall pay to the city treasurer two per cent. of its gross receipts; at the expiration of each and every year during the entire period above mentioned the treasurer of said railway shall submit to the city treasurer a sworn statement of such gross receipts, and shall therewith pay to the city treasurer the percentage so found to be due." This was complied with until 1888, when, under the advice of counsel, the city attempted to levy an ad valorem tax, upon the claim that the ordinance of 1879 and an amendment adopted in 1888 were ultra vires. The same claim is made now by the respondent in answer to relator's assertion that the only tax that the city is entitled to must rest upon the agreement contained in the ordinance in this case, as changed in 1885. In the circuit court the respondent's claim was sustained upon the ground that the city had no power to exempt the relator from taxation, or to tax it upon a different basis than that upon which other property is taxed, and that it had no power to impose a specific tax on property which the general laws of the state subjects to an ad valorem tax, and that it could not lawfully exempt from taxation the franchise of one street railway, and tax that of another.

The exact question before us appears to be, was it lawful for the city to make a contract fixing the rate of city taxation which should be binding upon the city, after the repeal of the special tax imposed by the tram-railway law, and be efficacious to relieve the street railway from paying its share of the general tax for city purposes? Counsel for the relator contend that its authority to do so is settled by the decision upon this or a similar ordinance in the case of City of Detroit v. Detroit City Ry. Co., 76 Mich. 421, 43 N. W. 447, while the circuit court was of the opinion that the question is not necessarily

concluded by that case, and that what was then said upon the subject of the validity of such agreements was obiter, because the court decided only that the city could not tax under the ordinance and also under the general law. The opinion in that case shows that the tax upon the basis of the ordinance amounted to $6,250.40, and the company had made payment on the earnings for the first half of the year, leaving a little over $3,000 due for the entire year. The tax assessed under the general law was about $1,000 less than the aggregate for the year upon the basis of percentage upon earnings. It was the opinion of the learned circuit judges that the only question decided was that the city was not entitled to both taxes, and that only that question should be considered to be concluded. Their opinion seems to rest upon the proposition that, as the constitution forbids the creation of private corporations by any other than general laws, it also forbids the imposition of different specific taxes upon corporations similarly situated, and organized under the same general law, and that the city of Detroit could not discriminate between its street railway lines, by taxing one and exempting another, to any degree, but that the same rule must apply to all. An examination of the record in that case shows that it was an action of debt brought by the city to recover taxes claimed to be due. The first count claimed something over $6,000 under the general law. The second count was for a tax levied under the ordinance. The court held that the law repealing the state specific tax was constitutional, and hence the property of tram roads was thereby turned over for taxation under the general tax law, and that the ordinance of 1879, declared upon, had been repealed by a later one passed in 1887, and hence there could be no recovery upon that count. The city took no judgment for either tax, although it might seem that it was entitled to one or the other, and upon appeal the judgment was affirmed. In disposing of the case this court showed that section 22 of the organic act imposed a specific tax upon all corporations that might be organized under it, while by section 34 it was provided that no such company should construct a railway in any street "without the consent of the municipal authorities of such town or city, and under such regulations, and upon such terms and conditions, as said authorities may from time to time prescribe: provided, further, that after such consent shall have been given, and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining, and operating such railway in the street in such consent or grant named, pursuant to the terms thereof." The opinion states further that various arrangements were made from time to time between the city and the company, and in November, 1879, a new agreement

was made, whereby it was agreed, among other things, that the defendant should pay a yearly tax of 1 per cent. upon its gross receipts, and do certain paving, and that "this special tax and paving liability should be in lieu of license and other taxes and paving charges." In 1882, section 22 of the organic act providing for the special tax was repealed, and, disputes arising over an attempt to apply the general tax law to the defendant, a new agreement was made in 1887, whereby it was agreed that 1½ per cent. should be paid for a time, and later 2 per cent., upon gross receipts, in lieu of all taxes, license fees, and charges. If the general law was in force as to city taxes against the defendant, the agreement of 1887 was void, and nothing was in the way to prevent this court from reversing the case upon the ground that the city was entitled, under admitted facts, to a judgment for such taxes, upon an ad valorem basis, under the general law and second count. But it did not do that. It denied relief altogether, and while it was distinctly held that the law of 1882 was constitutional, and therefore repealed the state specific tax, it was also said that since that law was passed the parties had compromised their rights, and agreed upon another sum that should be paid in lieu of all assessable taxes, and that this could not be recovered, because the declaration counted on the earlier and different ordinance of 1879, which was repealed by the agreement of 1887. We are unable to see how this result could be reached, if the repeal of section 22 in 1882 abrogated an existing ordinance. It seems to us that the logical and necessary inference is that the ordinance was a binding contract, still in force. To our minds, there is no difficulty in this. The legislature has, unless prohibited by constitutional restrictions, full power to pass special laws, and always had. The only limitation asserted is the provision that private corporations can be created under general laws only. But, being created under general laws, the legislature may grant privileges to them by special law in any case, that it might do the same to individuals, unless some constitutional provision not cited precludes it. Again, it may impose specific taxes upon corporations. That has generally been done by the organic act, and therefore by general law. A spirit of fairness might seem to require uniformity in such tax between all corporations organized under a general law, but, the corporations being created, what is in the way of imposing specific taxes upon each according to the circumstances attending each? The legislature is authorized to impose specific taxes. It may do so or not as it deems best. It may authorize cities to do so, and has done so in nearly every city or village charter heretofore granted. Kitson v. City of Ann Arbor, 26 Mich. 325; Youngblood v. Sexton, 32 Mich. 406. The organic act under which this street railway was organized compelled the defendant to submit to such terms in regard to local taxation as it should be able to make with the city. See City of Detroit v. Detroit City Ry. Co., supra. And every other street railway was obliged

to do the same. This was a general law, but it left the city to impose or omit a special tax in each particular case as it should see fit. That may or may not have been wise. It is not a question of wisdom, but of power. When the city saw fit to make its easements and local taxes the subject of contract, the agreement bound both parties, and there is no reason for requiring the private corporation to live up to every provision of the contract, and permitting the municipal corporation to disregard it at will. Such contract was made, and is as binding as though made by the legislature itself. The railway company has paid the tax stipulated for, and been to a large expense in paving, etc., under the contract. The abolition of a special tax and the passage of a general tax law have not changed the contract. At least, this was the view we understand to have been taken in the case of City of Detroit v. Detroit City Ry. Co., which we think is conclusive of the question. Cooley, Tax'n, p. 66. That, in the absence of constitutional prohibition, the legislature has unlimited power, does not admit of doubt. See Railroad Co. v. Le Sueur (Ariz.) 19 Pac. 157, 1 L. R. A. 244. The respondent must be content to measure its city taxes by the terms of its contract.

Power of Legislature in Absence of Constitutional Prohibition.

Same.

It is contended that this immunity for taxation was not assignable with the property of the Grand River Railway Company, but we think this position untenable. The statute permits an assignment, and all rights resting in contract are included. Section 15 of the street railway law provides: "Any street railway company may also purchase and acquire, either at public or private sale, whether judicial or otherwise, or may hire any street railway in any city, village or township, owned by any other corporation or company, together with all the real and personal estate belonging thereto, and the rights, privileges and franchises thereof, and may use, maintain and complete such road, and may use and enjoy the rights, privileges and franchises of such company, the same, and upon the same terms as the company whose road and franchises were so acquired might have done. Every street railway company may also purchase, hold, own, and take upon lease such real estate barns, stables, buildings, fixtures and property as may be necessary for the use and business of their road; and the whole or any part thereof, together with their railway, fixtures, property and appurtenances, rights, privileges and franchises, may sell, lease, dispose of, pledge or mortgage whenever the corporation shall deem it expedient to do so."

Same.

We now approach a question of fact, viz. was the intangible personal property (i. e. the franchise) assessed with the tangible property, and, if so, did such assessment include the first two classes of franchises. An issue was framed upon this subject, and the finding shows that the franchise to construct, maintain, and operate

Evidence—Conclusive on Appeal.

the railway, and to collect fares, was taken into consideration in valuing relator's personal property. There is testimony which supports this finding; for, while Hally testifies that in considering the subject an estimate was placed on several items of property, and also upon the franchises, the board finally adopted an aggregate sum which should include all. He was asked: "Mr. Hutchins stated, if I recollect his testimony correctly, that in his talks with you that you refused to separate or give them the franchise valuations and valuations of the different pieces of property and kinds at the times they were there. What was said about that?"—and answered: "Why, I did refuse. My testimony is simply that I had placed—that we had placed—the assessment against each one of the companies as a unit, and had taken into consideration the trackage and overhead system and rolling stock and machinery and power-house plant and the franchise, in making the assessment, and that the sum total represented the value that we had placed upon the whole of it." This finding of fact is final. The case, being here by certiorari, is not to be tried de novo; nor can the finding be set aside unless it clearly appears to be unsupported by the evidence. Dove v. Independent School Dist., 41 Iowa, 689; Odendahl v. Russell, 86 Iowa, 669, 53 N. W. 336; Independent Dist. No. 2 v. Rhodes, 88 Iowa, 570, 55 N. W. 524; People v. Town of Waynesville, 88 Ill. 469; People v. Albright, 14 Abb. Prac. 305.

Much stress is laid upon the fact that the assessment closely approximates the aggregate of certain items (one of which was franchises, $2,000,000) which were made and reported by a commission appointed, as we understand it, by the council, to ascertain the value of the property, with a view to its purchase by some one, which figures and report were before the assessors and considered by them. It is insisted that we must find that this was the actual assessment, although these items were combined in the roll finally. If the question was not concluded by the findings, and if we could say that the aggregate contained an assessment placed on the naked franchise, disassociated from the tangible personal property, and irrespective of the cash value of the whole, we might be justified in treating it as an improper assessment, and, although made in good faith, a legal fraud. But we are not to hastily treat mental processes as assessments, and, if the assessors could be said to have estimated the franchise separately, taking into account its duration and its profitableness, to ascertain the value of the plant, it does not necessarily invalidate the assessment. Perhaps no two of the assessors reached the result by the same process, but that is not material, if they finally concluded that the property was honestly worth in the market, in cash, the sum assessed.

Method of Assessment Immaterial.

Complaint is made that the assessors refused to specify to relators separate values upon the franchise and the tangible

erty, or to tell how they reached the conclusion arrived them. There seems to have been no misunderstanding een the parties as to what property was being assessed. knew it was the street-railway plant, and relator knew the board claimed that the privileges should increase the : of the tangible property. It had hearings before the l and a committee of the council acting under orders from ouncil in the matter of review. It was told that the l had been advised that the franchise could not be sepa- y assessed. It is significant that there is no evidence l to our attention that this tangible property, in connec- with the privileges that belong to it, and which would be with it, is worth less than the amount at which it was sed. No offer was made to produce such proof before r board, and we have no reason for saying that the prop- was overvalued, unless we should sustain relator's con- on that intangible values should be eliminated altogether. hink this assessment should not be set aside merely be- : an effort may have been made by some one to separate ble and intangible values,—a thing that was unnecessary, ne that was harmless, provided, as already stated, the l really did reach the conclusion that the property was n and would bring in cash the sum adopted.

ere is another branch of this case which we must yet der, viz. whether the proceeding was void for irregularity.

—Waiver nical The claim is made that there are several fatal defects in the proceedings. They are as follows:

"The assessment roll was not completed by the l of assessors on the first Tuesday of April. No assess- had been made against the street-railway companies on fore the third Tuesday of April. No opportunity was n them on or before the third Tuesday of April to see or what their respective assessments were. No legal hear- vas given them by the board of assessors, sitting as a l of review. No hearing on their appeal was given relat- y the common council, sitting as a board of review. The ng given relators by the common council was not a hear- f their appeal by the common council as prescribed by te. The circuit court could not lawfully refuse to pass upon rounds set up in the so-called supplemental appeal of relat- om the action of the board of assessors. The assessment id because fraudulently and knowingly excessive, and be- : the judgment of the assessors was never brought to bear the value of the relator's property, and because the sors failed and refused to separate the tangible from the gible personal property of relators." The common coun- Detroit is the board of review, and an appeal was taken the assessment made by the board of assessors, on April upon grounds stated in relator's protests filed with the l of assessors. In conformity to its usual practice, the

council referred the matter to its committee to investigate and report. Relators appeared before the committee and were heard on several occasions, without objection, and afterwards the committee made a report to the council upon the relator's assessment, which was adopted. On the 8th day of May the relators addressed to the council a claim of further appeal, for several additional reasons and grounds. If these points were called to the attention of the board of assessors, the proof has escaped our observation. They were not included in the original protest. It is stated that they were not filed with the council until after the hearings before the committee were concluded, and on the same evening that the committee's report was adopted. The circuit court held that this supplemental appeal should not be considered. The city charter (section 168) provides for the appeal, and contains the following: "Their appeal shall be in writing and shall state specially the ground of the appeal and the matter complained of, and no other matter shall be considered." It appears that the relator ascertained the amount of its assessment, and contested it repeatedly before the board of assessors and the committee of the board of review. It raised none of these alleged jurisdictional questions now said to be fatal, but rested and relied upon the four points contained in its protest. After all of these hearings, if not after the report of the committee, it filed a paper claiming another appeal upon the ground of alleged technical irregularities. These were not considered, and we agree with the circuit court that they were not entitled to consideration. Relator had raised the meritorious questions, and its rights were in a situation to be secured upon review if the council dealt unjustly with it, but it had waived the technical ones. Assessment and collection of taxes is a matter of so much detail that absolute accuracy is impossible, and the statute (Comp. Laws, § 3922) attempts to protect the public against irregularities that do not prejudice, and the courts recognize the validity of this legislation. "The party alleging error must show error to his prejudice." Louden v. East Saginaw, 41 Mich. 18, 2 N. W. 182. "Irregularities in assessment, when not prejudicial to protestant, give no right to recovery." White v. Millbrook Tp., 50 Mich. 532, 27 N. W. 674. See, also, Stockle v. Silsbee, 41 Mich. 615, 2 N. W. 900; Wright v. Dunham, 13 Mich. 414; Bird v. Perkins, 33 Mich. 28; Wilt v. Cutler, 38 Mich. 189; Auditor General v. Sparrow, 116 Mich. 574, 74 N. W. 881; Same v. Keweenan Ass'n, 107 Mich. 405, 65 N. W. 288.

Counsel contend that their rights have been violated in this: "(1) That after the assessments against the relators were made they were denied the right of review before the board of assessors; (2) that the relators were denied an opportunity to be heard by the common council upon the appeals taken by them to that body." They

nsist that the method adopted, of not filling out the roll until after the amounts of assessments were fixed by board of review, was not a compliance with the law, and consequently they were denied the right of review before the board of assessors. We think the method adopted was not a compliance with the law, and there is no reason why the board should not have a completed roll at the time prescribed. See Common Council v. Smith, 99 Mich. 510, 58 N. W. 481. But we think this is not fatal in this case. The relators understood the situation, and had an opportunity to be heard as effectively as though the roll had been finished and present. Had these questions been raised seasonably, there might be more merit in this contention. It is as though the relator had not appeared before the board of review. See Caledonia Tp. v. Rose, 94 Mich. 216, 53 N. W. 927. We think the roll was in existence, to all intents and purposes, so far as the questions raised before the board of assessors are concerned. Auditor General v. Ayer (Mich.) 80 N. W. 997. Whether a second appeal was allowable or not, the council was justified in treating it as abandoned. It is possible that the relator had a right to be heard before the council upon the subject of its first appeal, for it cannot delegate the power of final determination, but it was not required to notify the relator when to attend. This report was filed May 8th. Presumably, it embodied all contests that had arisen. Several persons who had appealed were heard by the council that night. The relator contented itself with sending a paper to be filed, expressing a desire to be heard upon the matter, and also upon a further appeal. If it desired to be heard, it should have been present and asked to be heard. Relator has not been denied due process of law. It has had its opportunity to be heard upon every meritorious question that it has raised. Attorney General v. Jochim, 99 Mich. 371, 58 N. W. 511, 23 L. R. A. 699; Rouse v. Donovan, 104 Mich. 235, 62 N. W. 359, 27 L. R. A. 577. As foreshadowed by what has been said, the order of the circuit court denying the writ of mandamus must be affirmed. The other justices concurred.

Filing Roll of Assessments.

Board of Review—Notification to Appellant Not Necessary.

MACON CONSOL. ST. R. CO.

v.

MAYOR, ETC., OF CITY OF MACON.

(*Supreme Court of Georgia, Feb. 26, 1901.*)

[38 S. E. Rep. 60.]

Judicial Interference with Municipal Discretion.*—Courts will not enjoin a municipal corporation from performing an act within the scope

*See notes at end of case.

of its authority and discretion, when the act is neither unreasonable nor arbitrary.

Cannot Restrict by Contract Its Legislative or Discretionary Powers.—A municipal corporation cannot make a valid contract abrogating or restricting its legislative or discretionary power, and an agreement by which a city undertakes to devest itself of such power cannot be used as the foundation for an estoppel against it.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Judge.

Suit by the Macon Consolidated Street-Railroad Company against the mayor and council of the city of Macon. Judgment for defendant, and plaintiff brings error. Affirmed.

Bacon, Miller & Brunson, for plaintiff in error.

Minter Wimberly and C. H. Hall, Jr., for defendant in error.

Cobb, J. The Macon City & Suburban Railway Company laid one of its lines of railway in one of the streets of the city of Macon under and by virtue of a contract between it and the city. Subsequently the Macon Consolidated Street-Railroad Company acquired the rights and franchises of the Macon City & Suburban Railway Company. Thereafter, on July 26, 1899, the legislative body of the city passed a resolution requiring the street-railway company to remove its tracks from the side to the center of a named street. On May 29, 1900, this resolution was repealed; the change required to be made by the first resolution never having been made. On June 19, 1900, the city rescinded its action of May 29, 1900, and served the railway company with notice that it must move its tracks as required by the original resolution of July 26, 1899. This action was taken pursuant to a recommendation of the street committee. Thereafter the street-railway company brought its petition for an injunction to restrain the mayor and council of the city of Macon from requiring the petitioner to move its tracks. The injunction having been refused, the petitioner excepted.

Case Stated.

1. It is contended on behalf of the street-railway company that the resolution requiring it to change the location of its tracks is unreasonable, and that for this reason its enforcement should be enjoined. It has not been, and we do not think it could be with any degree of plausibility, contended that the city of Macon did not have authority to require the railway company to make any reasonable change in the location of its tracks in a given street. The state has delegated to the city of Macon authority over its streets. It has a right, under its charter, to grant to a street-railway company authority to lay its tracks in these streets; but any such grant is necessarily subject to the power of the city to make any reasonable regulation of its use. "A railroad company which secures the

right to use the streets of a city takes such right subject to all reasonable regulations and ordinances enacted by the city in the exercise of its police power." Elliott, Roads & S. § 807. See, also, Booth, St. Ry. Law, § 222. "The power of a municipal corporation to make police regulations includes authority to make reasonable provision for the peace, safety, and convenience of its inhabitants. Such regulations usually concern the use of streets either by individuals or by corporations with railway cars." 15 Am. & Eng. Enc. Law (1st Ed.) 1167. These principles are well settled, but it is equally settled that, having granted a railway company permission to lay its tracks in the streets, the municipal authorities cannot prevent the successful enjoyment of the franchise. In cases, therefore, of municipal regulation of the manner in which a street-railway company may enjoy the privilege granted to it to use the streets, the question often arises as to whether the regulation is a legitimate exercise of the police power of the city, or whether it really amounts to an unwarranted interference with the franchise. "As applied to the control of street railways, the police power is the continuing and paramount authority of the legislature, within its constitutional prerogatives, and of municipal corporations, under their delegated powers, to established regulations which promote the public welfare, do not unreasonably interfere with the franchise, management, or business of the company, or violate the obligations of any valid contract." Booth, St. Ry. Law, p. 302, § 220. Every municipal regulation which does not amount to a deprivation or impairment of the franchise will be upheld, unless it is unreasonable and arbitrary. The discretion of the municipal authorities as to these matters is very broad, and it will not be interfered with save in the case just mentioned. Is a regulation by a city requiring a street-railroad company to remove its tracks from one part of a street to another a legitimate exercise of its legislative power? We think it is, provided the proposed change is not arbitrarily and capriciously required by the city, but is really necessary for the convenience and welfare of the public. See, in this connection, Elliott, Roads & S. § 760; Booth, St. Ry. Law, § 62. The municipal authorities must necessarily, in the exercise of their discretion, be left to determine the necessity and propriety of the proposed change. The courts will not readily interfere with the governing authorities of a city in the performance of a discretionary act. It is only where it "has passed the boundary of legislative and judicial discretion, and is exercising the municipal power arbitrarily to the injury and oppression of the citizen," that judicial interference will be justified. City of Atlanta v. Holliday, 96 Ga. 546, 23 S. E. 509. See, also, Wells v. Mayor, etc., 43 Ga. 67; Danielly v. Cabaniss, 52 Ga. 212 (Syl., point 4); Mayor, etc., v. Camak, 75 Ga. 429; City of Atlanta v. Gate City St. R. Co., 80 Ga. 276, 4 S. E.

Judicial Interference with Municipal Discretion.

269; Burckhardt v. City of Atlanta, 103 Ga. 302, 30 S. E. 32. In the present case, however, under the contract between the city and the predecessor of the plaintiff, and by which it is, of course, bound, the city expressly reserved the right to require that such changes be made under the direction of its engineer and street committee. It is true that the entire meaning of the contract is by no means clear, but, construing it all together, it is clear that the city reserved the right to require the changes to be made. Whether under the contract the railroad company must pay the entire costs of removal, or whether the city is required to share such expenses, is not a question raised by the present record. Under the evidence introduced at the hearing the court was well warranted in finding that the requirement made of the plaintiff was not capricious, unreasonable, or arbitrary, but that the proposed change was necessary for the convenience and safety of persons living along the street, as well as of the general public.

2. It is contended, however, that, even conceding that the city had the primary right to require the change in location of tracks to be made, it is estopped to make any such regulation, by virtue of an agreement made between the plaintiff company and the mayor and council subsequent to the passage of the resolution of July 26, 1899, that the change would not be required of the company, provided it would cease to use a switch connected with the line, and construct a certain kind of turnout on the opposite side of the street. It appears that, pursuant to this agreement, the company dismissed a petition it had pending to enjoin the city from enforcing its resolution of July 26, 1899, and that it has proceeded in good faith to carry out its part of the agreement. It may be that the mayor and council, in endeavoring now to enforce a relocation of the track, has not kept absolute good faith with the company in the matter of this agreement. Be this as it may, we are clear that the agreement itself was beyond the power of the mayor and council. They are the representatives of the public, and are placed in power to conserve the interests of the public. They are, for this purpose, invested with certain governmental and legislative duties, and these cannot be bargained away. This agreement is an attempt on the part of the mayor and council to tie their hands, as well as those of their successors, with respect to a matter of great public interest. It is, in effect, a contract on their part that they will not in the future, no matter how much the public convenience or safety may demand it, attempt to regulate the location of the tracks of this company in this street. We are clear that this cannot be done. Municipal corporations "may make authorized contracts, but they have no power, as a party, to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties." 1 Dill. Mun.

Cannot Restrict by Contract Its Legislative or Discretionary Powers.

Corp. (4th Ed.) § 97. See, also, Id. p. 518, § 458, note 1. "A city cannot alienate its governmental and police powers." Elliott, Roads & S. § 805. "It may be said, generally, that the state, or its duly-authorized municipality, may require a street-railway company to do whatever is required for the health, safety, and welfare of the community; for the authority to enact measures for this purpose never passes from the sovereign, no matter what grants it make." Id. § 758. "Common councils and municipal boards and officers clothed with legislative and police powers cannot, either for themselves or their successors, abrogate the authority with which they are invested." Booth, St. Ry. Law, § 8. In Wabash R. Co. v. City of Defiance, 167 U. S. 88, 17 Sup. Ct. 748, 42 L. Ed. 87, it appeared that the city of Defiance passed an ordinance authorizing the railroad company to erect new bridges over and across its track where the same crossed certain public streets. These bridges were erected by the company at great expense. Subsequently the common council of the city passed an ordinance changing the grade of that part of these streets where they crossed the railway track to the level of the railway. These changes rendered necessary the removal of the bridges. The railroad company sought to enjoin the enforcement of the ordinances, and set up, among other things, that the ordinances requiring the change of grade were an impairment of the contract contained in the ordinance granting authority to erect the bridges. The judgment of the supreme court of Ohio refusing the injunction was affirmed. In the opinion Mr. Justice Brown uses the following language: "While municipalities, when authorized so to do, doubtless have the power to make certain contracts with respect to the use of their streets, which are obligatory upon them [citing authorities], the general rule to be extracted from the authorities is that the legislative power vested in municipal bodies is something which cannot be bartered away in such manner as to disable them from the performance of their public functions." In New York & N. E. R. Co. v. Town of Bristol, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269, the following language was used: "The governmental power of self-protection cannot be contracted away; nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury." In Louisville City Ry. Co. v. City of Louisville, 8 Bush, 416, it appeared that the city had made an agreement with the company by which the latter constructed and operated a line of railroads over certain streets of the city. The agreement specified that the track should be constructed of the "most approved rail." The tracks were laid with "crescent rails," with the consent and approval of the city. Subsequently the city decided to change the pavement used on these streets, and ordered the railway company to take up its tracks and put down "tram rails"; the

latter being better suited to the new pavement. The railway company sought to prevent the enforcement of this order, and set up the original agreement with the city under which the crescent rails were used. It was held that the city could not by covenant limit its legislative discretion, and that "the general council could not by contract deprive itself of the power to regulate the reconstruction of railways made necessary by the changes in the character of pavement used upon the streets of the city." See, also, Karst v. Railroad Co., 22 Minn. 118; Branson v. City of Philadelphia, 47 Pa. St. 329; State v. Murphy (Mo. Sup.) 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369; Richmond County Gaslight Co. v. Town of Middleton, 59 N. Y. 228; Dingman v. People, 51 Ill. 277; Brick Presbyterian Church of New York v. Mayor etc., of City of New York, 5 Cow. 538; Milhau v. Sharp, 27 N. Y. 611; Martin v. Mayor of Brooklyn, 1 Hill, 545; Matthews v. City of Alexandria, 68 Mo. 115; Gale v. Village of Kalamazoo, 23 Mich. 344. The city of Macon having no power to make a contract whereby it surrendered its power to require the plaintiff in error to move its tracks from one part of the street to another whenever such removal was necessary for the public welfare, such an agreement made by the city cannot be used as the foundation for an estoppel to prevent the city from exercising its discretionary power to require such a change to be made. See, in this connection, Bigelow, Estop. (5th Ed.) 466, 467; Snyder v. City of Mt. Pulaski (Ill. Sup.) 52 N. E. 62; Laing v. City of Americus, 86 Ga. 758, 13 S. E. 107. There is no decision of this court which conflicts with the ruling here made. In City of Atlanta v. Gate City Gaslight Co., 71 Ga. 125, the city had authority to consent for the street to be used by the gas company; and, having such authority, when it stood by and saw the gas company expend large sums of money in laying pipes in certain streets of the city, it would be thereafter estopped from denying the right of the company, under its charter from the state, to lay its pipes. The same distinction is to be noted in the case of Mayor, etc., of Athens v. Georgia R. Co., 72 Ga. 800. It was ruled in Laing v. City of Americus, supra, that there could be no estoppel where there was no power to consent. In City Council v. Burum, 93 Ga. 68, 19 S. E. 820, it was ruled that there would be an equitable estoppel against a "needless or capricious" revocation of a license to erect and maintain awnings over a sidewalk, until sufficient time had elapsed to allow those who had thereby incurred expense to realize, in the way of use and enjoyment, a fair return for their outlay. In that case the city had a right to grant the license, and was attempting to revoke it needlessly and capriciously. The city of Augusta did not undertake to contract that it would never, even if the public safety demanded it, require reasonable changes to be made in the construction and location of these awnings, and its right to do so was not involved in that case. That case is wholly

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dissimilar from the present one, and governed by an entirely different principle. Our conclusion is that the judge did not err in refusing to grant the injunction. Judgment affirmed. All the justices concurring.

NOTES.

JUDICIAL INTERFERENCE WITH MUNICIPAL DISCRETION.

In General.—The discretion of municipal corporations within the sphere of their powers is as wide as that possessed by the government of a state. St. Louis *v.* Boffinger, 19 Mo. 15; Des Moines Gas Co. *v.* Des Moines, 44 Iowa 505, 24 Am. Rep. 756. There can therefore ordinarily be no judicial restraint or interference with a municipal corporation in the *bona fide* exercise of powers, legislative or discretionary in their nature, provided private rights are not violated. Cape May & S. L. R. Co. *v.* Cape May, 35 N. J. Eq. 419. The law-making power of a municipal corporation within its prescribed limits is as much a co-ordinate branch of the state government as the general assembly. It is no more competent for the judiciary to interfere with the legislative acts of one than the other. Des Moines Gas Co. *v.* Des Moines, 44 Iowa 505; State *v.* Swearingen, 12 Ga. 23; Danielly *v.* Cabaniss, 52 Ga. 111; Mayor, etc., of Athens *v.* Comak, 75 Ga. 429; Satterthwaite *v.* Beaufort Co., 76 N. Car. 153; Wilson *v.* Charlotte, 74 N. Car. 748; Inhabitants of Melpomena St. *v.* New Orleans, 14 La. Ann. 455; New Orleans, etc., R. Co. *v.* Dunn, 51 Ala. 128; Lockwood *v.* St. Louis, 24 Mo. 20; Sheidley *v.* Lynch, 95 Mo. 487, 24 Am. & Eng. Corp. Cas. 520; Dean *v.* Todd, 22 Mo. 90; Schanck *v.* Mayor, etc., of New York, 69 N. Y. 444; Wiggins *v.* New York, 9 Paige (N. Y.) 16; Kelley *v.* Milwaukee, 18 Wis. 83; New York & H. R. Co. *v.* Mayor, etc., of New York, 1 Hilt. (N. Y.) 562; Handy *v.* New Orleans, 39 La. Ann. 107.

Statement and Reason of the Rule.—In Burckhardt *et al. v.* City of Atlanta, 103 Ga. 302, 30 S. E. Rep. 32, the court, by LEWIS, J., says: "The question of improving, repairing, or repaving the streets of Atlanta is left to the discretion of its municipal legislature. It is a well established rule of the law that the courts will not interfere with the exercise of such discretion unless the power conferred is exceeded, or fraud is imputed and shown, or there is an arbitrary and unreasonable invasion of private rights. 1 Dill. Mun. Corp. § 94; State *v.* Swearingen, 12 Ga. 23; Mayor, etc., *v.* Comak, 75 Ga. 429; Speer *v.* Mayor, etc., 85 Ga. 49, 11 S. E. 802; Regenstein *v.* City of Atlanta, 98 Ga. 167, 25 S. E. 428. While the state is jealous of her sovereign right of legislation, and while a strict construction will be given any legislative power conferred by her upon one of her communities, yet it should not receive such a narrow interpretation as would result in defeating the very ends for which it was conferred. An incorporated city is a government within a government. It has its own executive, judicial, and legislative branches. It is a creature of the state, and can exercise no power that is not derived from its creator. Where legislative power is conferred upon it by the state, it is necessary that a degree of freedom should be allowed in its exercise; otherwise the city would be so hampered in the

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government of its people as would defeat the very ends of its incorporation. Hence it is that the state courts will never interfere with the free exercise of such rights as are left to the discretion of a corporate authority, unless such authority should go beyond the scope of power delegated, or unless the discretion given should be abused by an arbitrary exercise thereof, and by a plain and unwarranted violation of private rights."

A court of chancery has no jurisdiction to interfere with the public duties of any department of municipal government, except under special circumstances and when necessary for the protection of the rights of property. Sheridan *v.* Colvin, 78 Ill. 237.

"All legislative acts or exercise of discretionary powers within their authority are beyond the control of the courts, however unwise or impolitic, or even when done from corrupt motives or for unworthy purposes." CHANCELLOR ZABRISKIE, in Bond *v.* City of Newark, 4 C. E. Gr. (N. J.) 376. VICE CHANCELLOR DODD gave expression to similar views in Schumm *v.* Seymour, 9 C. E. Gr. (N. J.) 143.

There are acts which a municipal corporation may do within the limits of its charter, without being subject to the supervision of any court. Such acts are those done under its legislative and discretionary power. Sherlock *v.* Winnetka, 59 Ill. 389; Barhite *v.* Home Tel. Co., 63 N. Y. S. 659, 50 App. Div. 25.

Discretion as to Manner of Exercise of General Power Granted.—Says the court, in City of Topeka *v.* Huntoon, 46 Kan. 634, 33 Am. & Eng. Corp. Cas. 67, 26 Pac. Rep. 488: "Power to do an act is often conferred upon municipal corporations in general terms, without being accompanied by any prescribed mode of exercising it. In such cases the common council necessarily have, to a greater or less extent, a discretion as to the manner in which the power shall be used. This discretion, where it is conferred or exists, cannot be judicially interfered with or questioned, except where the power is exceeded, or fraud is imputed and shown, or there is a manifest invasion of private rights. Evansville I. & C. S. L. R. Co. *v.* Evansville, 15 Ind. 395; Kelley *v.* Milwaukee, 18 Wis. 83; Slack *v.* Maysville & L. R. Co., 13 B. Mon. (Ky.) 1; Bridgeport *v.* Housatonic R. Co., 15 Conn. 475; Page *v.* St. Louis, 20 Mo. 136; Mayor, etc., of Baltimore *v.* Gill, 31 Md. 375; Union Pac. R. Co. *v.* Cheyenne, 113 U. S. 516. Thus, for example, if a city has power to grade streets, the courts will not inquire into the necessity for the exercise of it, or the refusal to exercise it; nor whether a particular grade adopted, or a particular mode of exercising the grade, is judicious. Teegarden *v.* City of Racine, 56 Wis. 545; Sheridan *v.* Colvin, 78 Ill. 237; Hovey *v.* Mayo, 43 Me. 322; Richmond *v.* McGirr, 78 Ind. 192."

A court of equity will not interfere with the exercise of the discretion vested in the municipal authorities of cities and villages as to the propriety and necessity of widening, laying out, grading, or repairing streets and sidewalks, unless there is manifest injustice, oppression, or gross abuse of power. Dunham *v.* Village of Hyde Park, 75 Ill. 371; Brush *v.* Carbondale, 78 Ill. 74; Hovey *v.* Mayo, 43 Me. 222; Motz *v.* Detroit, 11 Mich. 495.

Under the power expressly granted to the city of New Orleans to regulate the use of its street by railways, a discretion is vested as to the method of regulation, which will not be judicially interfered with,

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unless it is oppressive. State *v.* Cozzens (La.), 46 Am. & Eng. R. Cas. 168. And where a municipal corporation in the improvement of its streets acts within the scope of the authority conferred upon it, and complies with the forms of statute, its proceedings cannot be reversed upon *certiorari*. *Ex parte* Mayor, etc., of Albany, 42 Wend. (N. Y.) 277.

Where a city is given power to remove obstruction, widen, etc., a river, "the courts cannot discriminate and say, you shall remove this wreck but you need not remove that sandbar, or deepen the river in another place or straighten it in another." The law leaves these matters to the discretion of the municipality. Goodrich *v.* Chicago, 20 Ill. 445. And where the city has the power to contract for a water supply, the price, and kind of water, and the amount, are matters of legislative discretion vested in the city council; and when the city confines herself within the limits of her power to contract, its legal discretion exercised by the council will not be inquired into by the courts, in the absence of fraud and corrupt and extravagant legislation, which are beyond the legitimate object and purpose of municipal government. Conery *v.* New Orleans Waterworks Co. (La.), 29 Am. & Eng. Corp. Cas. 323. So the right of a city to charter a gas company before the franchise of another company previously chartered has expired, cannot be restrained by injunction. The courts cannot interfere with a proper legislative enactment. Des Moines Gas Co. *v.* Des Moines, 44 Iowa 505. A municipal corporation having power to construct public buildings but forbidden to raise money, or loan its credit to, or in aid of, any private corporation, passed an ordinance providing for the contracting with a railroad company for the erection of public buildings. It was held that the court could not interfere on the ground that the real object of the ordinance was to aid the railroad company. Coulson *v.* Portland, 1 Deady (C. C.) 481.

Action Must Be Ultra Vires or Fraudulent.—A city, in accordance with a vote of the council, contracted for the use of certain rooms for city purposes for twenty years, and undertook to issue script to pay therefor, in advance. *Held*, that in the absence of fraud the court could not interfere to restrain the issuance of the script. "In the absence of actual fraud, courts cannot interfere with the judgment and discretion of city councils in determining what are, and what are not suitable rooms, for the purpose of the city and its officers." Moses *v.* Risdon, 46 Iowa 251. A taxpayer cannot set the courts in motion to interfere with the exercise of municipal power, upon the ground that the action done is unwise or oppressive. To sustain such interference, it must appear either that the act was *ultra vires*, or fraudulent or corrupt. Wells *v.* Atlanta, 43 Ga. 67. A court of equity has no power to compel a city to construct a sewer. Horton *v.* Mayor, etc., of Nashville, 4 Lea (Tenn.) 39, 40 Am. Rep. 1. In the absence of positive proof of fraud, an ordinance enacted by the mayor and city council of a city of the first class, establishing a sewer district therein, is not subject to judicial interference upon the ground that it is unreasonable. City of Topeka *v.* Huntoon, 46 Kan. 634, 33 Am. & Eng. Corp. Cas. 67, 26 Pac. Rep. 488.

In Sheridan *v.* Colvin, 78 Ill. 237, it was sought to enjoin a city council from enforcing an ordinance on the sole ground that if the ordinance was in force it would deprive the complainants of the function of offi-

ces which they held in the city. *Held*, that a court of chancery had no jurisdiction.

But if the municipal legislation violates vested rights or inflicts irreparable wrong the courts may intervene. Cape May & S. L. R. Co. *v.* Cape May, 35 N. J. Eq. 419. And if a municipal corporation disposes of property, which it holds in trust for the benefit of its constituents, without any consideration, this is not the exercise of political power delegated for public purposes, and is not exempt from judicial interference. Sherlock *v.* Winnetka, 59 Ill. 389. Indeed there is no doubt that equity has jurisdiction to prevent a municipal corporation from abusing its powers. Place *v.* Providence, 12 R. I. 1; Cape May, etc., R. Co. *v.* Cape May, 35 N. J. Eq. 419; Holland *v.* Baltimore, 11 Md. 186. A bill in chancery against a municipal corporation to prevent a threatened usurpation of power for the violation of a legal duty whereby the burden of taxation will be increased, may be filed by property holders or taxpayers without the intervention of the attorney general or other officers representing the state. New Orleans, etc., R. Co. *v.* Dunn, 51 Ala. 128; and see Valparaiso *v.* Gardner, 97 Ind. 1.

The execution of a contract by a municipal corporation is a ministerial act, and may be enjoined if the contract is in excess of corporate authority. Valparaiso *v.* Gardner, 97 Ind. 1. But a clear case of wilful oppression must be made out in order to obtain relief from the courts. Reynolds *v.* Shreveport, 13 La. Ann. 426.

STATE *ex rel.* CITY OF NEW ORLEANS *et al.*

v.

KING, Judge.

(*Supreme Court of Louisiana, Feb. 18, 1901.*)

[29 So. Rep. 359.]

Control of Tracks in Street—Municipal Discretion.*—The city of New Orleans is acting within the scope of its administrative and police power in authorizing the laying of a third rail in connection with the rearrangement of the tracks upon, and the paving of, one of its streets, though the question of the right of the particular company actually laying such rail to make use of the same is involved in litigation. Whether it is advisable to lay the rail under such circumstances, in order to provide against the possible future breaking up of the pavement for that purpose, is a matter of legislative discretion.

Ownership of Soil on Which Tracks Are Laid—Qualified Ownership of Railway Company of Its Ties, Rails, etc.—Street-railway companies do not own the soil of the streets of New Orleans upon which their tracks are laid, and their ownership of the ties, rails, etc., constituting their tracks, is qualified by the fact that the city of New Orleans has the right to authorize other roads to use such tracks.

Dissolution of Injunction by Mandamus.—In this case an injunction issued to restrain the laying of a third rail, the laying of which was

*See notes to preceding case.

State *v.* King

authorized by the city of New Orleans. *Held*, that the injunction should have been dissolved as on bond upon the application of the city, and on bond upon the application of the company acting under such authority; and *mandamus* to that effect is made peremptory.

(Syllabus by the Court.)

Application by the state, on relation of the city of New Orleans and another, for a writ of mandamus against Fred. D. King, judge. Alternative writ made peremptory.

Samuel L. Gilmore, City Atty., and Harry H. Hall, for relators.

Fred. D. King (Dart & Kernan, of counsel), pro se.

Monroe, J. The relators, the city of New Orleans and the St. Charles Street Railroad Company, which for the purposes of the present opinion will be called the St. Charles Company, apply for a writ of mandamus to compel the dissolution, on bond, and under the statute, of an injunction issued against them at the instance of the New Orleans & Carrollton Railroad Company, which will be called the Carrollton Company. The return of the respondent judge is amplified by the annexation thereto of the pleadings in the case in which the injunction was issued, together with considerable evidence, oral and documentary, received upon the trial of the rule nisi which preceded the issuance of said injunction. The case as thus presented is as follows, to wit:

Case Stated.

Canal street, between Basin street and the river, being the central thoroughfare from and to which almost all street cars operated in New Orleans take their departure and return, had, by reason of the multiplication of tracks and cars, become so confused and congested that the city authorities deemed it necessary that the tracks should be rearranged, and that certain changes should be made in the handling of the cars. In the attempt to frame an ordinance on the subject, they were met with difficulties arising out of the effort to reconcile the conflicting interests of the different companies operating the cars, and progress in the desired direction was therefore slow. In May, 1899, however, an ordinance (No. 15,254) was adopted, directing the rearrangement of the tracks, and also directing that the cars of the Rampart & Dryades streets line of the St. Charles Company, which enter Canal street at Rampart, should, instead of leaving that street immediately upon reaching St. Charles, run on to the ferry landing at the river, and thence back, leaving Canal street at St. Charles upon the return, and thereby extending the route of said line on Canal street by about 2,500 feet, and changing the starting point or stand from St. Charles street near the corner of Canal to Canal street near the ferry landing. It was further provided that over this extension the cars of the St. Charles Company should use the tracks either of the City Railroad Company or of the Carrollton Company as far (in the direction of the ferry land-

ing) as those tracks extended. The ordinance so adopted was variously amended during the year 1899, but the result was unsatisfactory to the Carrollton Company, and no action was taken under it. In January, 1900, another ordinance was adopted, under which it appears to have been intimated that the city, in the exercise of its administrative and police powers, would make the changes contemplated without waiting for the assent of the railroad companies. Thereupon the Carrollton Company filed a petition in the civil district court, setting up certain rights in itself, attacking the validity of the said ordinances, and praying for an injunction to restrain action under them. The application for the preliminary injunction was shortly afterwards dicontinued; the case was put at issue; the plaintiff amended by alleging that it was a property holder and taxpayer, and desired to appear in that capacity, to which the St. Charles Company answered; and thereafter the matter was allowed to rest. Hostilities were nevertheless being carried on in another quarter. It appears that in December, 1899, the city of New Orleans adopted an ordinance authorizing the sale of certain railroad franchises, which included the franchise to run cars on Canal street between St. Charles and the ferry landing, and the sale was advertised to take place upon March 29, 1900. Upon March 16th, a few days before the filing of the supplemental petition by the Carrollton Company, as hereinbefore stated, Peter Johnson and E. J. Dare, appearing as citizens and taxpayers, instituted suit attacking said ordinance on various grounds, and praying that it be declared null, and that the proposed sale be perpetually enjoined; and, a preliminary injunction having been issued on March 23d, the defendants in injunction were refused permission to dissolve on bond, and the matter came before this court, with the result that the judge a quo was directed to dissolve the injunction as on bond; and, this order having been complied with, the sale was allowed to proceed (the question as to the validity of such sale being reserved to the merits), and the franchise was adjudicated to the St. Charles Company. It may be remarked here that the case was afterwards tried upon its merits, there was judgment in the court a qua to the effect that the sale was invalid, an appeal was taken, and the judgment appealed from is reversed in an opinion this day handed down. 29 South. 355.

In the meantime a demand had arisen for the repaving of that part of Canal street upon which the congestion exists; and it was desirable, from considerations of both economy and convenience, that any rearrangement of the tracks which was to take place should be accomplished at once, and before the laying of the new pavement. The efforts to bring about some sort of an arrangement upon the subject became, therefore, if possible, more earnest and persistent; and finally, in September, 1900, an ordinance (No. 205, New Council Series) was adopted amending and re-enacting those which had pre-

ceded upon the subject of the rearrangement of the tracks, etc., and dealing with the disputed question arising out of the proposed change with regard to the operation of the cars of the St. Charles Street Company by providing that a third rail should be laid to meet the difference in gauge requirements, so that the St. Charles Company might be able to run its cars over the tracks of the Carrollton Company, but that no cars should be so run until the question of the validity of the franchise claimed by the St. Charles Company should have been finally determined in this court; and, in the event of its being determined adversely to said company, that said third rail should be taken up at the expense of said company. It was believed by the mayor of the city and by the president of the St. Charles Company that this arrangement would be satisfactory to, and would be acquiesced in by, all parties in interest. And this belief proved to be well founded as to all of the parties save the Carrollton Company, since the other roads operating cars on Canal street signed a contract accepting the ordinance according to its terms. That there was some reason for supposing that the Carrollton Company would pursue the same course appears from certain resolutions adopted by its board of directors, and from a letter written by its acting president to the mayor and council of New Orleans in June, 1899. Later on, however, the company seems to have decided that while it would, with full reservation of its rights as against the St. Charles Company, co-operate in other respects in the rearrangement of the tracks, it would continue to oppose the laying of the third rail; and it notified the St. Charles Company to that effect. The city in the meanwhile had contracted for the paving, and the work was in progress, following close upon the rearrangement of the tracks, and moving in the direction of the river. When St. Charles street was reached, the subject became interesting to the St. Charles Company, for the reason that from that point it was necessary that the third rail should be laid, in order to enable it to operate its cars as provided in the ordinance. When, therefore, the Carrollton Company had rearranged its tracks for about a square beyond St. Charles street, and the paving contractor had given notice that he was ready to follow with the paving, the St. Charles Company began the work of putting in the third rail. But this work was not allowed to proceed very far. The employees of the Carrollton Company appeared and placed themselves in the way. Thereupon the president of the St. Charles Company appealed to the mayor, and the mayor ordered the chief of police to preserve the peace, which that officer accomplished by warning the Carrollton Company's employees against further obstructing the work in which the St. Charles Company was engaged. This occurred upon the night of January 23d, between 8 and 10 o'clock. Upon the following day the Carrollton Company filed a supplemental petition in its pending suit against the city and the St. Charles Company,

setting up absolute and exclusive ownership in the roadbeds and tracks upon and in connection with which the third rail was being laid; alleging that the ordinance authorizing the sale of the franchise to run cars over said tracks from St. Charles street to the ferry landing, and the sale of such franchise to the said St. Charles Company, were void, and praying for an injunction and for judgment decreeing the nullity of said ordinance and sale, etc. After a hearing upon a rule nisi a preliminary injunction was issued as prayed for, enjoining and restraining the city of New Orleans and the St. Charles Company "from interfering by force with the use, possession, and enjoyment by plaintiff * * * of its tracks, roadbed, right of way, and franchises on Canal street from Dryades to Liberty Place, in this city, and from continuing in * * * unlawful possession, through the medium of the police, of all that portion of the plaintiff's track on Canal street between St. Charles and Camp streets, in this city, and * * * from enforcing * * * Ordinances No. 15,254 * * * and the amendments thereto, and Ordinance No. 205 * * * and the amendments thereto, * * * and from * * * attempting to exercise any of the rights, privileges, or benefits * * * attempted to be conferred by virtue of the alleged adjudication of the franchise under Ordinance 15,809, * * * and consummated by the contract between the city and the St. Charles * * * Company, and particularly enjoining the St. Charles Company from exercising any rights or privileges over said Carrollton * * * Company's tracks on Canal street from St. Charles street to Liberty Place, * * * and from laying a third rail thereon, as authorized by said franchise," etc. Thereupon the city and the St. Charles Company moved that said injunction be dissolved on bond as to the St. Charles Company, and, under the statute, without bond as to the city, which motion having been denied, the present application was made to this court.

In their petition the relators set forth the various proceedings as hereinbefore described, including the issuance of the injunction, and aver that the effect of said injunction is to stop all paving on the neutral ground of Canal street, from a point between Camp and St. Charles streets and the river, and that said work is one of great public importance and necessity, which is being prosecuted by the city government in the exercise of the authority and discretion confided to it by law. They further aver that no attempt was made to prove that the Carrollton Company would suffer any pecuniary injury by the laying of the third rail; that it was proven, and not denied, that the only interference with the property of said company consisted in the laying of said rail in conformity to the provisions of the rearrangement ordinances; that the Carrollton Company had consented to all the work required under said ordinances, and had co-operated in ordering and putting the same in, with the exception of said third rail,

against the use of which, alone, by the St. Charles Company, it protested; that relators have a right to bond said injunction, and that they made application for permission to do so, which was refused; and that such refusal was arbitrary and illegal. And relators further aver that the Carrollton Company, by deferring action until it was supposed that the exigency of the paving work would constrain the relators to forego their rights, indicates an intention illegally to embarrass and disregard public rights, and that said injunction is an interference by the court with the action of a co-ordinate branch of the government, acting in the exercise of the police power and for the convenience and safety of the citizens of New Orleans; and they pray for a mandamus, etc.

To this petition the respondent judge makes answer and return as follows, to wit: "(1) That the petition herein filed does not accurately and correctly set forth the facts alleged and established, nor the grounds of complaint of the New Orleans & Carrollton Railroad Company, set out in its petition and supplemental petition, upon which this respondent acted; and, that the court may be more fully informed thereon, respondent annexes to his answer the record of said cases, showing the pleadings, also the evidence and documents filed. (2) That respondent found at the hearing of the rule nisi, and so held: That the complaint of the plaintiff, the New Orleans & Carrollton Railroad Company, was well founded in fact and in law. That the relator the St. Charles Street Railroad Company had taken forcible possession on the night of Wednesday, January 23, 1901, of the roadbed, cross-ties, and tracks of the New Orleans & Carrollton Railroad Company on Canal street, between St. Charles and Camp streets, in New Orleans. That said St. Charles Street Railroad Company was aided and actively assisted in so doing by the chief of police of New Orleans, and police officers acting in his presence and under his orders. That the agents and employees of the said New Orleans & Carrollton Railroad Company there present and engaged in preparing the tracks for paving, then and there being done, were driven from the property by the chief of police under threat of arrest and imprisonment. That the property thus taken by the police from the Carrollton road and delivered to the St. Charles road was the property of the former company, and in no wise the property of the latter, who had no right, title, or ownership therein. That, acting under police protection, the St. Charles Street Company proceeded to remove certain tie rods from the rails of the track, and attached other tie rods thereto, and laid another or third rail upon the cross-ties of the Carrollton Company and alongside of the track, connecting the same by spikes to the cross-ties of the latter company, and by bolts and other appliances to the third rail; the whole being done during the night of January 23d. That no previous legal proceeding had been taken by the St. Charles Street Railroad Company to devest the owner-

ship of the New Orleans & Carrollton Railroad Company in the property, or to enforce at law any right which the former corporation might have, or claim to have, over, in, or upon said track, cross-ties, roadbed, and rails of the latter company; nor had said St. Charles Street Railroad Company made previous payment for the material and property thus appropriated. That the New Orleans & Carrollton Railroad had never acquiesced in the rearrangement ordinances or in the franchise ordinances referred to in the original and supplemental petitions; nor had it in any way acknowledged or recognized or acquiesced in any act, ordinance, or law of the city of New Orleans conferring rights on the St. Charles Street Company on, in, or to said property of the Carrollton Company, or in and to the franchise and right of way over the latter's tracks from St. Charles street to Liberty Place; thence to the ferry landing at the head of Canal street. That the chief of police was not acting on the orders or within the scope of the authority given him by law, or by the mayor of New Orleans. That the latter disclaimed, on the witness stand, having given any orders or authority to the chief of police authorizing him to proceed in the manner described. That respondent held, and now alleges, that the act of the chief of police and the St. Charles Street Company in the premises was a trespass upon the rights and property of the Carrollton Railroad Company, and utterly without warrant or authority in law, and was an unauthorized seizure and taking of the private property of the Carrollton Railroad Company without previous payment therefor, and was a usurpation and wrong to private rights of property, which could not be justified by any consideration of benefit to the public or to the St. Charles Street Railroad Company. (3) That the Carrollton Railroad Company acted promptly, and as soon as it was ascertained that the St. Charles Street Company intended to exercise the right claimed under the ordinances, to lay and use the third rail in question. That the writ of injunction does not interfere in any manner with the paving of Canal street, which can and should proceed without interruption or delay, and without the laying of the third rail; the only effect being that, if this court should hereafter maintain the franchise in favor of the St. Charles Street road, the cost of laying the third rail will be increased by about $3,000, for which cost and damages the relator will be protected by the bond which the respondent has required the plaintiff to give before the injunction may issue. That the rail in question, whenever laid, will be laid on the upper and lower side portions of the neutral ground on Canal street, and will disturb the same only in a very limited space; and it was established that the paving can be pushed on without any reason for delay, whether the third rail is or is not laid down, and there is no public necessity for laying same pending judicial inquiry into the rights of the parties in the premises. (4) That the rearrangement ordinances of the city of New

Orleans were attacked by the Carrollton Railroad Company in its original and supplemental petitions, upon the ground that the grant therein conferred upon the St. Charles Street Railroad Company, of a right of way on Canal street from St. Charles street to the ferry landing, was not germane to the subject-matter and was contrary to the declared objects and purposes of the ordinances; was a violation of the city charter, which requires the selling of such franchises, after advertisement, at auction, to the highest bidder; was a valuable franchise, which would have realized a good price under competition; and was palpably an attempt to give, without consideration, to said St. Charles Street Railroad Company a valuable and exclusive franchise not granted in said ordinances to the competitors of said railroad company, and joint occupants of the Canal street tracks. That, on the face of the papers, said contentions seem to be sound, and make out a prima facie case in favor of said plaintiff in injunction. (5) That the franchise, under Ordinance No. 15,809, A. S., of the city of New Orleans, and the contracts thereunder in favor of the St. Charles Street Railroad Company, are also attacked by the New Orleans & Carrollton Railroad company, on grounds less extensive, but substantially the same, as those urged in the case of Dare & Johnson v. St. Charles Street Railroad; and inasmuch as respondent decided said suit against the St. Charles railroad, and said judgment has not yet been reviewed by this court, and inasmuch as respondent has heard nothing to cause him to change his mind upon the merits of the controversy, or to throw doubt upon the correctness of his decision, respondent was bound in law and conscience to hold that the said company had no valid, subsisting franchise rights in and upon Canal street from St. Charles street to the ferry landing. (6) That having reached the conclusion that the plaintiff, the New Orleans & Carrollton Railroad Company, had been wrongfully and forcibly dispossessed of its private property without previous compensation or due process of law, and that the defendant the St. Charles Street Company had been wrongfully and forcibly placed in possession thereof without title or ownership therein or right of possession thereto, and that the rearrangement ordinances and franchise ordinance and contracts aforesaid were invalid and gave no warrant in law for the wrongful action of the police authorities and the St. Charles Street Railroad Company, respondent ordered the issuance of the injunction complained of. (7) That, having so found and decided, respondent considered that the acts so prohibited were such as to work the plaintiff in injunction irreparable injury, and respondent refused to permit the writ to be bonded, holding the action justified under the facts and the interpretation of the statute in State v. Somerville (La.) 28 South. 977, and other cases on the same subject-matter. That respondent believes that in so acting he has properly exercised the discretion vested in him by law.

Wherefore respondent submits the said action and refusal to this honorable court, and, for the reasons above given, prays that the preliminary orders herein issued may be revoked and recalled, and the writ of mandamus refused, and for all general and equitable relief."

It seems to us, from this return, taken in connection with the reasons given for issuing the injunction (which are in the record as part of the return), and with the injunction itself, that the judge a quo has proceeded upon the theory that the right of the relators to have such injunction dissolved is dependent upon the determination of either of two questions: (1) As to the validity of the franchise said to have been acquired by the St. Charles Company to operate its cars upon Canal street between St. Charles street and the ferry landing; and (2) as to the right of said company, under and by virtue of said franchise, to make use of the roadbeds, ties, and rails which had been prepared and laid at the expense of the Carrollton Company. As to the first of these questions, it appears that he had already decided, in another case, that no valid franchise had been granted; and, giving the plaintiff in injunction the benefit of that decision, he says, in effect, to the defendants: "I have heretofore decided that no valid franchise to operate cars on Canal street between St. Charles street and the ferry landing has been granted to the St. Charles Company. You are now attempting, nevertheless, to exercise that franchise, and the effect of the injunction of which you complain is to restrain you from doing so. I have found no reason, however, to change my mind; and, holding now, as I have done heretofore, that no such franchise exists, I cannot permit you, by dissolving the injunction on bond, to do something which the law does not authorize."

Control of Tracks in Street—Municipal Discretion.

Pretermitting the question whether the defendants in injunction are attempting to exercise the franchise in question, and assuming, for the purposes of the present question, that they are so attempting, the view taken by our learned Brother seems to involve a decision of the case upon the merits, but without a hearing on the merits. Of course, if the decision in Johnson & Dare v. The City et al. is conclusive upon the parties now before the court, it may be said, from the point of view from which we are now considering the matter, that it was properly applied; but supposing that the suit of one taxpayer, suing for himself and others similarly situated, constitutes lis pendens as to a suit against the same parties on the same cause of action by another taxpayer, yet, if the plaintiff is allowed to go on with the second suit, it can hardly at the same time be held that the defendants are so bound by the pendency of the first as not to be entitled to be heard upon the merits of the second. And if the relators, as defendants in the court a qua, were entitled to be heard upon the merits of the question of franchise vel non, then the only thing properly before the

court on the motion to dissolve the injunction on bond was whether such dissolution would work irreparable injury to the plaintiff in injunction, and the fact that in another case the respondent had decided that there was no valid franchise was irrelevant and insufficient as a reason for denying such motion. But it abundantly appears from the record that the ordinance (No. 205, New Council Series) under the authority of which it is proposed to lay the third rail was adopted for the express purpose of avoiding the difficulties which appeared to stand in the way of any attempt to countenance the existence of the franchise in dispute. The situation was as follows: The city found the middle of Canal street covered with car tracks of a certain gauge, and considered it advisable that they should be rearranged, and that the street at the same time should be paved. There was one railroad company, however, with cars of a wider gauge, which claimed the right to operate them within the territory in question, and to which the city had undertaken to concede that right; but the matter had become the subject of a litigation, the duration of which was uncertain, and in the meanwhile further action in the matter of the paving was suspended, for the reason that, if the pavement should be laid with no provision for the wide-gauge cars, there was the possibility of the public being subjected to the inconvenience, and the parties in interest to the expense, of tearing it up again in order to make such provision, whereas, if the necessary third rail should be laid before or in connection with the paving, it was considered that, in the event of its being held that no franchise to operate the wide-gauge cars had been legally granted, it would be less expensive and less inconvenient to remove the rail than it would be, in the other case, to lay it. The whole purpose of Ordinance No. 205, therefore, was to waive the question of the validity of the franchise to operate cars as claimed by the St. Charles Company, in order that the paving might not be retarded. The case would not have been materially different if the question of the right to operate wide-gauge cars within the disputed territory had never been raised and had not been pending at all; but the city, in view of the fact that a company operating them elsewhere might at some future time acquire that right, had chosen to prepare the street for it in advance. And that this was the understanding was apparent not only from the language of the ordinance, which disclaims any purpose to grant a franchise, or to prejudge the question of the validity of such grant, by providing that the rail to be laid shall not be used until the question is so decided, and that, in the event of a decision by this court adverse to the validity of the franchise claimed by the St. Charles Company, said rail shall be taken up, but also from the conduct of the parties, since the Carrollton Company, although opposing the laying of the third rail, has cooperated in the other work, which can be used only in the event that such third rail is laid.

It will be observed, also, that, while the injunction is directed to the city of New Orleans as well as to the St. Charles Company, the rights and obligations of the municipal corporation with respect to the administration of its principal thoroughfare do not seem to have been taken into account. It is nevertheless the law, as we understand it, and it has been so declared in terms by this court, that the streets of New Orleans are the common property of all the inhabitants of the city, and are held by the corporation in trust for their use and benefit; that the corporation is without power to alienate the soil, or to sell or grant the exclusive use of such street, but that it is authorized and required to regulate such use, and cannot devest itself of that authority and obligation, which is part of the police power and is inalienable; and, further, that the corporation has the specific authority to compel all lines of railway operating upon the same street to make use of the same track, and had such authority before the Carrollton Company acquired the right to operate its car on Canal street. Act No. 20 of 1882, § 8; New Orleans City & L. R. Co. v. City of New Orleans, 44 La. Ann. 748, 11 South. 77; New Orleans & C. R. Co. v. Canal & C. R. Co., 47 La. Ann. 476, 17 South. 834. It follows, therefore, that no railway company can be the absolute owner of a roadbed and track established in a street in New Orleans, but that such ownership is qualified by the fact that the ownership of the soil of the street is vested in the public, and the authority to administer and regulate the use of the street is vested inalienably in the municipal corporation.

Ownership of Soil on Which Tracks Are Laid —Qualified Ownership of Railway Company of Its Ties, Rails, etc.

Of the two questions, therefore, upon the decision of which is predicated the recognition of a right in the Carrollton Company to the injunction, and the denial of the right of the city and of the St. Charles Company to release such injunction on bond, the first (i. e. the question of the validity of the grant to the St. Charles Company of the franchise to operate its cars on Canal street between St. Charles street and the ferry landing) is not in this case; and the second (i. e. the question of the right of the St. Charles Company to lay a third rail outside of the track of the Carrollton Company upon ties laid by said company, and to attach the same to the rails laid by the said company, without previous expropriation or compensation) is not in the case except as an issue between the Carrollton Company and the city, since the St. Charles Company is not assuming to lay such rail by virtue of the franchise ordinance, but by virtue of the rearrangement ordinance, which was adopted by the city in the exercise of its police as well as its administrative power. The final question to be determined, then, is whether, upon the facts as presented, the rights and obligations of the city of New Orleans in the matter of the administration and regulation of its main thoroughfare dominate, or whether they are subordinate to, the rights asserted by the Carrollton Company with respect to so much of

such thoroughfare as is occupied by the roadbeds and tracks of that company. In considering this question we find, for the reason, mainly, that we approach it from a different point of view, that we are not altogether in accord with the respondent as to certain questions, some of them of mixed law and fact, and others of fact, which are important to the result. Thus the respondent says that the "St. Charles * * * Company had taken forcible possession on the night of Wednesday January 23, 1901, of the roadbed, cross-ties, and tracks of the Carrrollton * * * Company; * * * that said St. Charles * * * Company was aided * * * by the chief of police and police officers; * * * that the agents * * * of the * * * Carrollton * * * Company there present and engaged in preparing the tracks for paving then and there being done were driven from the property," etc. From our reading of the record, we conclude that the Carrollton Company had completed the work of relaying at least one of its tracks for some distance beyond St. Charles street, and that between 8 and 10 o'clock at night the St. Charles Company, acting under the authority of the city ordinance, began the work of putting in the third rail upon the track thus completed, in order that the paving contractor might not be delayed; the necessity for the completion of the entire work of rearranging tracks and paving being considered very urgent, on account of the great inconvenience, and perhaps danger, which is likely to result from leaving so central a street torn up and unpaved during the approaching carnival. We do not find that when the employees of the St. Charles Company began their work there were any of the employees of the Carrollton Company on the track where the work was begun, and hence the employees of the St. Charles Company used no force, and did not drive the employees of the Carrollton Company from the property. Upon the other hand, we understand that when the employees of the St. Charles Company began their work the employees of the Carrollton Company almost immediately obstructed them; that the president of the St. Charles Company then appealed to the mayor, who directed the chief of police to preserve the peace, and that the latter officer ordered the employees of the Carrollton Company to get out of the way and cease their obstruction. And it is in the light of this state of facts that we must consider the charge that the St. Charles Company, aided by the police, took forcible possession of the roadbeds, cross-ties and tracks of the Carrollton Company. In a certain sense, no doubt, it is true that, while the employees of the St. Charles Company were engaged in putting a third rail outside of the track of the Carrollton Company, they were in possession of the roadbed and track of the Carrollton Company; but it must be remembered that the roadbed and track in question form part of the middle of the main street of the city of New Orleans, and that the employees of

the St. Charles Company were putting down the rail by the authority of the municipal corporation. Their position was not very different, therefore, from that of the paving contractor, who was working under contract with the city, but who, it may be assumed, took possession of the different tracks, and possibly filled the spaces between the ties and covered the roadbeds with concrete or some other material, but of whom no complaint is made or is likely to be made, for the reason that he was acting under the authority of the city; and the city has not devested herself, and cannot devest herself, by grants to railway companies or otherwise, of either the authority or the obligation to control the condition of her streets. If, then, the paving contract had called for railroad iron, instead of the material used, it is difficult to perceive upon what ground the Carrollton Company could have objected; and, if no objection could have been successfully urged in such case against the paving contractor, there would appear to be no reason why it should be sustained when the city, through some other authorized representative, undertakes to lay a single rail in a street which she might pave with rails if she saw fit. The return of the respondent states "that the Carrollton * * * Comapny acted promptly, and as soon as it was ascertained that the St. Charles * * * Company intended to exercise the right claimed under the ordinance, to lay and use the third rail in question." The meaning of this is not very clear, but the record shows abundantly that the Carrollton Company was apprised long before the night of the 23d of January, 1901, that the St. Charles Company intended to lay the third rail when the work of rearranging the tracks reached the proper point, and was requested to co-operate with the St. Charles Company in the matter, but refused to do so, either by allowing the latter company to contribute to the expense of the special work to be put in, or otherwise. And it is also abundantly established that the St. Charles Company did not intend to operate its cars over the disputed territory, or make use of the third rail put in by it, unless and until the right to do so should have been sustained by the judgment of this court.

There has been no effort to show that any pecuniary damage will result to the Carrollton Company by the dissolution of the injunction, and we are unable to conceive how any such damage can result. It is claimed that to permit the laying of the third rail in question will be to permit and authorize an invasion of rights and a trespass upon property. The evidence shows that the rail is to be laid outside of the track, and upon the projecting ends of the cross-ties which support the rails constituting the track; that in order to lay it in place the spikes on the outer side of the track rail are drawn and replaced by what are called "filler blocks," being blocks of cast iron which hold the track rail and the third rail in their relative positions; and that the tie rods (i. e. iron rods running

from one rail to another, to assist in holding them in position and in keeping the track from spreading) are to be replaced by similar rods, which are long enough to run through all three rails. This construction, it appears, is identical with that adopted by the Carrollton Company itself on Canal street between St. Charles and Baronne, and is not the subject of criticism; the only question being as to the alleged invasion of right and trespass upon property of which the Carrollton Company claims to be the owner. We have already seen, however, that the Carrollton Company is not the owner of the soil upon which its track rests, and that it has only a qualified ownership in the ties, rails, etc., which constitute its track. The soil is part of the street, the title to which remains in the public, and the administration of which, for all the purposes of a street, is vested in the municipal corporation. The track laid by the railway company was so laid upon the express condition that the municipal corporation, having no power to grant to a private corporation or to a particular person the exclusive use of any part of the street, should have the right to authorize the use of said track by other companies; they to pay their proportion of the cost of construction and maintenance. It is evident from this that the case, as presented, bears but little resemblance to that of State ex rel. Cotting v. Somerville (La.) 28 South. 977, in which it appeared that the relator was the sole, absolute, and undisputed owner of land which was about to be taken for a public purpose without previous compensation. In the case before us the authority of the municipal corporation to administer Canal street and to control its condition is as far beyond dispute as was the title of relator in the Cotting Case to the land which was the subject of that litigation. It cannot be denied that in the exercise of such authority the city, while bound not to interfere unreasonably or unnecessarily with the railway company's use and enjoyment of its roadbed and track, can nevertheless enter upon such roadbed and track, as it can enter upon any other part of the street, and deal with the same as public interest, safety, or necessity may require. The question which immediately confronts us, therefore, is whether the particular act complained of is within the scope of the authority mentioned; that is to say, whether the putting down of the third rail, in the manner and under the circumstances disclosed, is to be regarded as an act done as a matter of public interest, safety, or necessity, in the exercise of the power to administer the streets and keep them in order, and without unreasonably or unnecessarily interfering with the rights granted to the railway company. And this question, we think, must be answered in the affirmative. Absolutely no interference with the use of its tracks by the railway company results from the mere laying of the third rail, and absolutely no pecuniary injury is inflicted. The rail, though laid upon the outside of the track of the company, rests upon the ties which support the track, and

which were placed in position by the company, but that is an accident of the situation. The rights of the company on Canal street, where space is measured by inches, are not to be determined by any rule which might be applied if its tracks were laid through a wilderness, upon a right of way of the usual width. We are not advised that it is necessary, considering the character of the paving which is being done by the city, that cross-ties should be used, and still less that it is essential that they should project beyond the rails constituting the track. We are not, therefore, in a position to hold that the laying of the third rail where it is proposed to lay it will, from any point of view, conflict with the rights granted to the Carrollton Company. As to the other matters,—the substitution of the "filler blocks" for spikes, and of the long tie rods for short ones,—it is enough that its property is not injured, and that the Carrollton Company is not thereby interfered with in the use of its tracks. We have no reason to believe that there is or can be anything in the grant to that company which would authorize it to so maintain its tracks as unnecessarily to obstruct the laying of others, and we are of opinion that it would be a misapplication of a valuable principle of law to hold that the acts in question constitute a taking of private property without compensation. We therefore conclude that the alternative writ of mandamus herein issued should now be made peremptory, and it is so ordered.

Dissolution of Injunction by Mandamus.

PEOPLE *ex rel.* RODGERS

v.

COLER, City Comptroller.

(*Court of Appeals of New York, February 26, 1901.*)

[59 N. E. Rep. 716.]

Granting of Mandamus Is Discretionary and Not Reviewable on Appeal.—The action of the appellate division in granting a writ of *mandamus*, being discretionary, will not be reviewed by the court of appeals.

New York Labor Law Held Unconstitutional.—The labor law (Laws 1897, c. 415, as amended by Laws 1899, cc. 192, 567) provides that laborers on public work shall be paid the prevailing rate of wages; that contracts for such work shall stipulate that they shall be void unless complying with the act; and that the contractor shall not be entitled to receive any sum, and no public officer shall pay the same, for work done on a contract which in form or manner of performance violates the statutory requisites of such contracts. Section 3 provides that public officers violating the act shall be guilty of malfeasance, and that

any citizen may maintain proceedings to suspend him, or to avoid or cancel contracts violating the act, or to restrain payment on such contracts. *Held*, that the act is unconstitutional, since it takes away the liberty of freely contracting both from municipalities and those contracting therewith.

Same—Deprives Persons of Their Property without Due Process of Law.—The act contravenes the provision of the constitution that no person shall be deprived of his property without due process of law.

Legislative Interference with Matters Purely Local.*—The legislature of a state has no right to interfere and control by compulsory legislation the action of municipal corporations with respect to property and contract right of purely local concern.

Stipulation in Contract Requiring Compliance with Labor Law Is of No Effect.—A stipulation in a contract that it should be void on failure to comply with the labor law (Laws 1897, c. 415, amended by Laws 1899, cc. 192, 567), which requires contractors on public work to pay the prevailing rate of wages, falls with the statute when the latter is declared unconstitutional, and hence will not estop the contractor from recovering on the contract, though the provisions of the statute were not complied with.

PARKER, C. J., and HAIGHT, J., dissenting.

Appeal from supreme court, appellate division, First department.

Application by the people, on the relation of William J. Rodgers, for mandamus to Bird S. Coler, as comptroller of the city of New York. From an order of the appellate division (67 N. Y. Supp. 701) reversing an order of the special term denying the relator's motion for a peremptory writ of mandamus commanding the comptroller to deliver to him a warrant on the chamberlain of the city of New York for the payment of $2,863, the amount earned by the relator under a contract with the city for regulating and grading 135th street from Amsterdam avenue to the Boulevard, and granting relator's motion for the writ, defendant appeals. Affirmed.

Case Stated.

The papers upon which the relator made the application show that on the 5th day of February, 1900, he made and entered into a contract with the city for regulating and grading that part of the street above described. The contract provided that, in order to prevent disputes and litigation, the chief engineer of highways should in all cases determine the amount and quantity of the several kinds of work which were to be paid for under the contract, and all questions in relation to his work, and the construction thereof; and that his estimate and decision should be final and conclusive upon the contractor, and a condition precedent to his right to receive any money under the contract. It is alleged that the relator proceeded to perform and carry out this contract, and prior to the application had performed the same according to

*See Blades *v.* Board of Water Com'rs of City of Detroit (Mich.), *ante*, p. 118, and *notes*, pp. 130, 131.

his promise, and to the satisfaction of the commissioner; that subsequently the chief engineer in charge of the work and the commissioner of highways made their certificate in writing that there was earned under the contract, in accordance with the terms thereof, by the relator, and then payable to him, the sum of $2,863. This certificate was filed in the office of the comptroller, who thereupon drew his warrant on the chamberlain for that sum, but refused to deliver the same to the relator, or to make the payment under the contract. The refusal of the comptroller is based entirely upon the fact alleged that the relator, in the performance of the contract, violated certain provisions of the labor law (chapter 415, Laws 1897, as amended by chapters 192, 567, Laws 1899). The following are, in substance, the provisions of this statute so far as they have any relation to the present case:

(1) The wages to be paid for a legal day's work, as hereinbefore defined, to all classes of such laborers, workmen, or mechanics upon all such public work, or upon any material to be used upon or in connection therewith, shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about, or in connection with which such labor is performed, in its final or completed form, is to be situated, erected, or used. Each said contract hereafter made shall contain a stipulation that each such laborer, workman, or mechanic employed by such contractor, subcontractor, or other person on, about, or upon such public work shall receive such wages herein provided for.

(2) Each contract for public work hereafter made shall contain a provision that the same shall be void and of no effect unless the person or corporation making or performing the same shall comply with the provisions of this act, and no such person or corporation shall be entitled to receive any sum, nor shall any officer, agent, or employee of the state or of a municipal corporation pay the same, or authorize its payment, from the funds under his charge or control, to any such person or corporation for work done upon any contract which, in its form or manner or performance, violates the provisions of this section.

(3) Any officer, agent, or employee of this state, or of a municipal corporation therein, having a duty to act in the premises, who violates, evades, or knowingly permits the violation or evasion of, any of the provisions of this act, shall be guilty of malfeasance in office, and shall be suspended or removed by the authority having the power to appoint or remove such officer, agent, or employee, otherwise by the governor. Any citizen of this state may maintain proceedings for the suspension or removal of such officer, agent, or employee, or may maintain an action for the purpose of securing the cancellation or avoidance of any contract which, by its terms or manner of performance, violates this act, or for the pur-

pose of preventing any officer, agent, or employee of such municipal corporation from paying or authorizing the payment of any public money for work done thereupon.

The contract was framed in compliance with these provisions of the law, and contains the following stipulation: "The wages to be paid for a legal day's work, as hereinbefore defined, to all classes of such laborers, workmen, or mechanics upon all such public work, or upon any material to be used upon or in connection therewith, shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about, or in connection with which labor is performed, in its final or completed form, is to be situated, erected, or used. It is further agreed that each such laborer, workman, or mechanic employed by such contractor, sub-contractor, or other person in, about, or upon such public work shall receive the wages hereinafter set forth. It is further agreed that this contract shall be void and of no effect unless the person or corporation making or performing the same shall comply with the provisions of the labor law. * * * The contract is to be void and of no effect unless the rate of wages specified in section three of said labor law is paid; and where laborers are employed preference is to be given to citizens of the state of New York, as provided in section thirteen thereof." The contractor paid to the persons employed by him in execution of the contract wages fixed as to amount by mutual agreement, and it is conceded that he paid all that was demanded of him, or that he agreed to pay. But, since it was conceded that the contractor did not in all cases pay the prevailing rate, the court at special term held that the contract and the law were violated, and that the relator was not entitled to the writ. The appellate division, by a divided court, reversed the order, and granted the relator's application, and from this order the corporation has appealed to this court.

John Whalen, Corp. Counsel (Theodore Connoly and Terence Farley, of counsel), for appellant.

L. Laflin Kellogg, for respondent.

O'Brien, J. (after stating the facts). There is no dispute with respect to the facts upon which this controversy depends. They are all admitted upon the record, and the appeal involves only questions of law. On the 5th day of February, 1900, the relator entered into a written contract with the proper administrative officer of the city of New York, whereby he undertook to regulate and grade a street. The law required that the work should be done by contract. It was a local improvement, the expense of which was ultimately to be charged to and paid by the local property owners. The city was the authority or agency to inaugurate the work, but, since it was for the benefit, in whole or in part, of private property, the owners or their property became liable ultimately for the

cost. That the relator actually performed the work embraced in the contract is not denied or disputed. The certificate of the officer in charge of the street was, by the terms of the contract, to be the evidence of performance; and that certificate was given and filed with the defendant, as comptroller, showing that the contract price stipulated to be paid had been earned; and the only ground upon which the defendant has based his refusal to pay is that the relator has not kept a certain stipulation in the contract. which has no relation whatever to the actual performance of the work, but to matters entirely extraneous. In other words, the comptroller asserts that, while the relator has actually performed the work and earned the compensation under the contract, he has forfeited the right to demand payment, since he has not observed the terms of the labor law. He contends that it is not enough that the relator has performed the work according to the specifications of the contract, unless he performed it by the very means and agencies therein stipulated; that the means and agencies prescribed by the contract were not mere matters of form, but matters of substance. The duty enjoined upon the comptroller, the performance of which is commanded by the writ, was ministerial; and if the relator was not entitled to the writ absolutely, and as matter of legal right, the court below had power to grant it, in the exercise of discretion. and, having granted it, the action of the court in that respect is not reviewable here. People v. Board of Education of City of New York, 158 N. Y. 125, 52 N. E. 722; Same v. Van Wyck, 157 N. Y. 495, 52 N. E. 559. The court below had power to grant the writ, and, having the power, it is of no consequence, even if it be true, as alleged, that the reasons given for its action are untenable.

Granting of Mandamus Is Discretionary and Not Reviewable on Appeal.

It must be admitted that the attitude of the city authorities in this respect presents a curious and anomalous situation, which involves some startling results. If they are right in the position taken, it must follow that the city must accept and receive the benefit of the improvements made by contractors to the extent of thousands or millions of dollars, and, though conceding that the work is honestly done precisely according to the specifications of the contract, yet it may refuse to pay if it is able to show that the contractor has not, in the execution of the contract, paid to all the workmen employed by him what is called "the prevailing rate of wages." The city may accept the work, and the citizens may enjoy the benefit of it, and treat the contract price as something forfeited by the contractors for their benefit. It is obvious that the reasoning and argument that leads to such a result must be at some point inherently faulty. It is not possible that such injustice can be sanctioned by the courts of any state where the principles of the common law are recognized. The fact that certain provisions of

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the labor law were actually incorporated into the contract signed by the contractor cannot change or add anything to the strength of the position assumed by the city. The relator is not estopped by the agreement when there is no element of estoppel in the case, and the question is with respect to the validity of the statute, and not the construction or effect of the contract in that regard. If the law is valid, it governs the contract and the rights of the parties, whether actually incorporated into the writing or not, since all contracts are assumed to be made with a view to existing laws on the subject. If it is not valid, the contractor has not made it so by stipulating in writing to obey it, and prescribing the penalty for his own disobedience, which is the forfeiture of all rights under the agreement. It is not in the power of the legislature to protect an invalid law from judicial scrutiny by providing that it must receive the assent of the parties to every contract to which it relates. The argument that the relator is bound by his voluntary assent to the terms of the contract would apply with equal force to the city, and estop it from raising the question now before us, since by the certificate of its own officers that the amount claimed is justly due to the relator according to the terms of the contract, the question of performance is deemed to be settled. The parties stipulated that this certificate should be final and conclusive, and it is not impeached for fraud or invalidity. Courts in such cases are not bound by mere forms, but must look at the substance of things, and, so viewing this transaction, it would be idle to attempt to deceive ourselves with the idea that the question involved in this appeal arises out of the stipulations of the parties to the contract, or is governed by them, rather than the provisions of a statute. The contract is in the form that we find it not because the parties so elected to contract, but for the reason that the statute would not permit them to contract in any other way.

Nor is it entirely true that the statute is a mere direction by the sovereign authority to one of its own agencies to contract in certain cases in a particular way. It is all that, no doubt, and very much more, since it affects personal and municipal rights in many directions that are of vastly more importance than the mere form of a contract to perform municipal work. It is true enough that a city is an agency of the state to discharge some of the functions of government, but these terms do not adequately describe its true relations to the state or the people. A municipal officer directing a local improvement is not the agent of the state. He is the agent of the city, and the city alone is responsible for his negligence or misconduct. If the authorities in charge of the streets of a city are agents of the state, the city ought not to be held liable for their acts or omissions. The city of New York exists under charters and laws as old as the state itself, and, while the legislature is clothed with extensive powers with

respect to the administration of local government, there are some things beyond its power. The legislature cannot authorize or compel a city to give any of its money or property, or to loan its credit for any private purpose, nor to expend any of its money, directly or indirectly, for any other than city purposes. If the legislature should, by statute, require a city to enter into contracts which directly or indirectly secure benefits to private individuals, or particular classes of citizens, and not for purely city purposes, the statute would be void, as in conflict with the spirit, if not the letter, of the constitution. All expenditures of money must be for city purposes, and that alone, except so far as it is authorized to devote funds to the relief of the poor, or to charity, which may be said to be a city purpose in the largest sense. A statute which tends to divert the money or property of the city or that of the local property owners from strictly city purposes, and devotes it, directly or indirectly, to private interests, or to the interests of some class of persons as distinguished from the whole body, whether the transaction is made to assume the form of payments of wages or something else, is in conflict with the spirit and policy of these provisions of the constitution. People v. Batchellor, 53 N. Y. 128; Same v. Albertson, 55 N. Y. 50. The legislature does not possess unrestricted power to bind a city hand and foot with respect to all its local business affairs. It cannot fix by statute the price which it must pay for materials or property that it may need, or the compensation that it must pay for labor or other services that it may be obliged to employ; at least when such regulations increase the cost beyond that which it would be obliged to pay in the ordinary course of business. If it could do all these things, it could virtually dispose of all the revenues of the city for such purposes as it thought best, and local self-government would be nothing but a sham and a delusion. The constitutional restrictions upon cities with respect to the expenditure of money are of no avail if the legislature can, by mandatory laws, compel the officers or the governing body to frame contracts in the interest or for the benefit of individuals or classes.

The city is a corporation possessing all the powers of corporations generally, and cannot be deprived of its property without its consent or due process of law any more than a private corporation can; and, since its revenues must be used for municipal purposes, it is difficult to see how the legislature can make contracts for it which involve the expenditure of these revenues without its consent. Counsel upon both sides of this controversy assert, and it seems to be undisputed, that there are now pending against the city, in consequence of alleged violations of the statute in question, claims aggregating over $6,000,000, representing the difference in the amount actually paid by the city to its employees, and accepted by them under contracts voluntarily made, and what is assumed

to be the prevailing rate of wages under the statute. If it be assumed that the statute requires the city to pay this vast sum in addition to what it paid under its contract with these employees, and which the latter freely accepted, it would be very difficult, if not impossible, to show that such payment is for a city purpose, and thus the municipality is compelled by the statute to violate the constitution. This situation would seem to prove that either the statute or the constitution must be disregarded. To the extent of the sum which the city pays under this statute in excess of that which is actually paid for the work under contracts fairly made in the ordinary course of business, the provision of the constitution limiting expenditures of money to city purposes is violated. These limitations upon the payment of money by cities apply as well to the power of the legislature. What the city is by the constitution forbidden to do, it is not competent for the legislature to authorize or command, either directly or indirectly; and the vice of the statute in question is to be found in the fact that it provides, or may provide, for a gratuity to some one, or perhaps more properly to some class of citizens.

The city exists under its ancient charters as modified or enlarged by modern enactment for the purpose of local self-government. While the rights and powers so conferred upon the city are subject to change or modification by the supreme power of the state, they cannot be wholly destroyed. It is not true that the internal affairs of cities in this state are absolutely subject to the will of the legislature. The constitution recognizes their existence as political and corporate bodies, and has imposed various restrictions upon the powers of the legislature to interfere in matters of local government. It is without power to appoint city officers, though it may provide for their election by the local electors, or their appointment by some local authority. It cannot dispose of the property of the municipality, nor disburse its revenues, however acquired, for any purpose not pertaining to local administration or local government. The recent amendment to the constitution, which confers upon the mayor in the larger cities and the mayor and governing body in the others the right to interpose what may be called a qualified veto upon acts of the state legislature relating to their local affairs, plainly implies that cities possess a certain kind of political autonomy, which, however limited, the legislature may not invade or destroy at pleasure. 1 Dill. Mun. Corp. §§ 71–74. It may regulate, but cannot destroy, powers recognized by the constitution as inherent in the cities of the state. The plain purpose and effect of the law in question was to deprive the city and its contractors of the exercise of all judgment and discretion in the matter of wages to be paid to workmen employed upon all public works. Both the city and the contractor are deprived by the statute of all power to deal with that question, and, consequently, of all power to protect most vital interests in

that regard by contract or otherwise. The right which is conceded to every private individual and every private corporation in the state to make their own contracts and their own bargains is denied to cities and to contractors for city work; and, moreover, if the latter attempt to assert such right, the money earned on the contract is declared to be forfeited to the city without the intervention of any legal process or judicial decree. The exercise of such a power is inconsistent with the principles of civil liberty, the preservation and enforcement of which was the main purpose in view when the constitution was enacted. If the legislature has power to deprive cities and their contractors of the right to agree with their workmen upon rates of compensation, why has it not the same power with respect to all private persons and all private corporations? That question can be answered in the language which his court used when a case with features somewhat similar was under consideration: "Such legislation may invade one class of rights to-day and another tomorrow, and, if it can be sanctioned under the constitution, while far removed in time we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed, and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and large range of other affairs long since in all civilized lands regarded as outside of governmental functions." In re Jacobs, 98 N. Y. 98. It was once a political maxim that the government governs best which governs the least. It is possible that we have now outgrown it, but it was an idea that was always present to the minds of the men who framed the constitution, and it is proper for courts to bear it in mind when expounding that instrument. The power to deprive master and servant of the right to agree upon the rate of wages which the latter was to receive is one of the things which can be regarded as impliedly prohibited by the fundamental law upon consideration of its whole scope and purpose as well as the restrictions and guaranties expressed. If the city is not permitted to enter into fair contracts with its employees for their services on such terms as private individuals or private corporations may, it is disabled from performing the duties enjoined upon it by law, or from obeying the restrictions of the constitution. Even the ordinary employees in the civil service of the city are protected by the constitution from the exercise of absolute power by the legislature. Appointments and promotions in such service must be made with reference to merit and fitness, to be ascertained, when practicable by competitive examinations. The legislature has no power to enact permissive or mandatory laws in conflict with that principle. These illustrations, and others which might be given, prove that the proposition that cities and their internal affairs are subjected to the absolute

will of the legislature, and that it has the power to command the municipality to do this or that, as it may think best, is very far from correct. There are many express limitations upon its power, and others are to be implied from the very nature of the right of local self-government conferred by the fundamental law. The legislature cannot appoint an officer to make the contracts of a city, and what it cannot do through its own appointee it cannot do by direct action. In this case the legislature made the contract for the city, at least so far as it relates to the employment of workmen and their wages. The prevailing rate of wages must be, from its very nature, a question of fact, governed by conditions and circumstances over which the contractor has no control. The legislature cannot compel him to decide that question at his peril by depriving him of the right to set it at rest by agreement with his employees.

Same—Deprives Persons of Their Property without Due Process of Law.

But the statute also invades private rights in various other directions. The local property owners, who are the parties that in the end must bear the expense of the improvement, are entitled to the benefit of the best judgment and discretion of the city officers in making the contract for the work. To the extent that such judgment and discretion is taken away by arbitrary enactments not in their interest, but in favor of opposing interests, their constitutional rights of liberty and property are invaded. When the expense of the improvement is enlarged beyond actual and reasonable cost under ordinary business conditions,—as it may be under the statute in question,—their property is taken without due process of law. The contractor is a private individual, engaged in private business. When he enters into a fair and honest contract for some municipal improvement, that contract is property, entitled to the same protection as any other property. It is not competent for the legislature to deprive him of the benefit of this contract by imposing burdensome conditions with respect to the means of performance, or to regulate the rate of wages which he shall pay to his workmen, or to withhold the contract price when such conditions are not complied with in the judgment of the city. When he is not left free to select his own workmen upon such terms as he and they can fairly agree upon, he is deprived of that liberty of action and right to accumulate property embraced within the guaranties of the constitution, since his right to the free use of all his faculties in the pursuit of an honest vocation is so far abridged. A statute which enables a city that has entered into a contract with him for the performance of some public work to receive and accept the fruits of his labor, and at the same time refuse to pay for it upon the ground that he omitted to pay the prevailing rate of wages to his workmen, though he paid all they asked, and all he agreed to pay, would seem to be an arbitrary interference with his liberty

and property, and not within the legitimate sphere of legislation. It is not claimed that the statute has any relation to the public health, the public morals, the public safety, or any of the other objects within the scope of the police power; and it is a somewhat remarkable fact that the learned counsel who has argued in support of this appeal and of this statute has not attempted to state the purpose for which it was enacted, but leaves that point wholly to conjecture.

It is impossible to see how such legislation could promote the true interests of the city or that of the local taxpayer, and not difficult to see how, in its actual operation, it would tend to increase the cost of every local improvement. Indeed, it is conceded on all sides that such has been the effect of the law upon the expense of public improvements in the city of New York. The very ground upon which the city refused to pay was that the contractor did not pay enough for the labor performed. If the claims referred to, aggregating over $6,000,000, must be paid, then it is plain that this law will cost the city that sum without any additional or corresponding benefit. The funds necessary to pay these claims would involve the expenditure of money for other than city purposes. It was supposed, no doubt, that the law would benefit wage earners, but it is not clear how it can if we consider that class of citizens as a body. A law that restricts freedom of contract on the part of both the master and servant cannot, in the end, operate to the benefit of either. The law forbids the contractor from paying a rate of wages other than what is called "the prevailing rate," although the laborer is willing to accept it. It calls for the payment, practically, on all occasions, of the highest market price, and hence must compel the contractor to employ only such workmen as are competent to earn the very highest rate of compensation. It makes no allowance for the various degrees of efficiency and capacity that must always exist in so large a part of the community. A person less competent than his neighbor, from whatever cause, cannot be employed, because a uniform rate must be paid, without taking into account the varying conditions of life and the degrees of capacity. Such a law may, indeed, benefit for a time the favored few who possess the largest capacity to earn the largest wages, and in this view it may be said that it provides only for the survival of the fittest. But the effect of the law must be that all those who are too young or too old, or for any other reason less competent than their neighbors, must be deprived of all opportunity to secure employment on all public works in their respective callings, and so the tendency of such legislation is to check individual exertion and to suppress industrial freedom. The contractor is not only deprived of the right to make such contracts with his workmen as would be mutually acceptable and beneficial, but he is required, in selecting his employee, to give preference to citizens of this state. Citizens of other states and resident

aliens are thus subjected to harsh discrimination. The citizens of each state are entitled to all privileges and immunities of citizens in the several states under the federal constitution, and persons still unnaturalized are protected by the broad principles of international law. It is not necessary to inquire how far, if at all, the rights of citizens of other states seeking employment here, or those of aliens who have come here to improve their condition and to earn an honest living, are ignored or restricted by this statute. These questions have not been raised or argued, and we will only remark that it reverses the settled policy of this state from the earliest times. The policy of New York has always been to welcome not only the citizens of out sister states, but emigrants from abroad, to equal participation in all the opportunities and advantages of its business and industrial life. If the policy indicated in the statute now under consideration had been formulated and carried into operation half a century earlier, it may be that the growth and progress of the state would not be the subject of so much pride, or as gratifying to all the people, as it is now. These conclusions result from principles that have been often stated by this court when paternal legislation of the same character was under consideration. In re Jacobs, 98 N. Y. 98; People v. Marx, 99 N. Y. 378, 2 N. E. 29; Same v. Gillson, 109 N. Y. 389, 17 N. E. 343; Colon v. Lisk, 153 N. Y. 188, 47 N. E. 302; People v. Hawkins, 157 N. Y. 1, 51 N. E. 257, 42 L. R. A. 490; Same v. Warden of City Prison, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264. Numerous other cases might be cited from other jurisdictions that tend to support the views expressed. They are referred to and quoted in the briefs of counsel, and it is unnecessary to comment upon them generally. These cases, however, deal with a great variety of statutes in line with the one involved in the case at bar. They constitute a valuable contribution to the law with respect to the scope and limits of legislative power. In all of them statutes differing in no essential principle from that now under consideration were held void as in conflict with constitutional restrictions, express or implied. The prominent feature in the discussions is that the legislation is condemned as an infringement upon the right of employer and employee to enter into contracts in their own way, and in some of them it was said that such legislation was an insulting attempt to put the laborer under legislative tutelage, which was not only degrading to his manhood, but subversive of his rights as a citizen. The statutes considered all profess to be for the purpose of securing to the wage earner his rights, but it was shown that they were really subversive of them. The following are a few of the laws thus considered and condemned, and it will be seen that they were all in line with the enactment in question: An act forbidding employers from withholding wages from employees engaged in weaving for imperfections in the work. Commonwealth v. Perry, 155 Mass. 117, 28 N.

E. 1126. An act to secure operators in coal mines and certain manufactories the payment of their wages at regular intervals, and in lawful money. Godcharles v. Wigeman, 113 Pa. St. 431, 6 Atl. 354; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621; State v. Fire Creek Co., Id. 188. An act relating to the payment of wages to miners employed upon the basis of the quantity of coal mined. Ramsey v. People, 142 Ill. 380, 32 N. E. 364, 17 L. R. A. 853. An act to provide for payment of wages in money, and prohibit the system of truck stores, and to prevent deductions from wages except for money advanced. Frorer v. People, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492. An act to provide for weekly payment of wages by corporations. Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. 62. An act declaring it unlawful for persons engaged in mining to pay wages otherwise than in money. State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789. A city ordinance enacting that laborers should receive not less than $1.50 per day, and that the day should not exceed eight hours. State v. Norton, 5 Ohio N. P. 183. The case last cited is not distinguishable from the one at bar. Indeed, it involves the very question; and, while it is not a decision of the highest court of the state, it is based upon the authority and the doctrines of the other cases cited, and upon reasoning that seems to be unanswerable. The case at bar differs from these cases, cited from the highest courts of other states, only in the circumstance that here the legislature has made use of municipal corporations to accomplish the purposes which were there condemned. But it must be obvious that what the legislature cannot do directly it cannot do indirectly. It cannot make use of its powers over municipal corporations to subvert rights of liberty and property guarantied by the constitution.

The compulsory authority of the legislature over municipal corporations in regard to matters of general concern and duties which the people of the several localities owe to the state at large is not questioned. Legislative control in matters political and governmental is complete. But while such corporations are made use of in state governments and in that character subject to state control, they have other objects and purposes peculiarly local, in which the state at large, except in conferring the power and regulating its exercise, is legally no more concerned than it is in the individual and private concerns of its several citizens; and it is from the standpoint, not of state interest, but of local interest, that the necessity of incorporating cities and villages most distinctly appears. With respect to property and contract rights of exclusively local concern, the state has no right to interfere and control by compulsory legislation the action of municipal corporations. The people of the state at large, through their representatives, have no more authority to dictate to a city the form in

Legislative Interference with Matters Purely Local.

which its contracts shall be framed, or the wages that it shall pay to laborers, than they have to dictate to an individual what he shall eat, drink, or wear. A municipal corporation, in matters affecting its property and its private contract rights, enjoys practically the same immunity from legislative interference for the benefit of private corporations or individuals as is accorded to business corporations and private citizens. Board of Park Com'rs v. Common Council of Detroit, 28 Mich. 228; Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. 655, 22 L. Ed. 455; People v. Batchellor, supra; Weismer v. Village of Douglas, 64 N. Y. 91; Board v. Blodgett, 155 Ill. 441, 40 N. E. 1025. The case of Clark v. State, 142 N. Y. 101, 36 N. E. 817, cited by the learned corporation counsel, is not in conflict with the views herein expressed. All that this case decided was that the state had power to declare by statute the compensation to be paid to its own employees in the absence of any agreement providing for a different rate. But the right to make contracts for the compensation to be paid, whether greater or less than the statutory rate, is expressly recognized and conceded throughout the opinion; and it is obvious that under the constitution that right could not be abrogated, since the power to employ labor is conferred by that instrument upon the superintendent of public works. The power to employ implies the power to agree upon the compensation, and, while the statute was applied to cases where no such agreement was made, it could not deprive the superintendent of the power conferred upon him by the constitution. People v. Angle, 109 N. Y. 564, 17 N. E. 413. The statute which was under consideration in that case did not attempt to interfere with the right to make contracts.

In the brief time that we have been able to devote to an examination of this case, it would not be practicable to consider all the special features of the law and to determine the parts that are good and those that are objectionable. It will be sufficient for all purposes of this case to say that, in so far as the statute is invoked to shield the city from the obligation to pay the relator the money due to him, it is not a valid defense, for the reason that some of its most material provisions are in conflict with the constitution: (1) Because in its actual operation it permits and requires the expenditure of the money of the city, or that of the local property owner, for other than city purposes. (2) Because it invades rights of liberty and property, in that it denies to the city and the contractor the right to agree with their employees upon the measure of their compensation, and compels them in all cases to pay an arbitrary and uniform rate, which is expressed in vague language, difficult to define or ascertain, and subject to constant change from artificial causes. (3) Because it virtually confiscates all property rights of the contractor under his contract for breach of his engagement to obey the statute,

Stipulation in Contract Requiring Compliance with Labor Law Is of No Effect.

and it attempts to make acts and omissions penal which in themselves are innocent and harmless. It, in effect, imposes a penalty upon the exercise by the city or by the contractor of the right to agree with their employees upon the terms and conditions of the employment. We have already seen that it is no answer to the relator's claim to be paid what is justly due to him to say that he has consented in the contract that it should be forfeited to the city in the event of a violation of the labor law. The question does not originate in any agreement voluntarily made, but arises out of the statute, and the validity or invalidity of that enactment is the fundamental question. Neither the city nor the contractor had any interest in these stipulations. They are in the contract only by force of the mandate of the statute, and, unless the legislature had power to frame the contract in that respect, their presence is of no consequence. The city could not maintain any action for damages for violation of these stipulations by the contractor for the plain reason that it was impossible for it to sustain any damages under the circumstances. Those provisions are a part of the contract in form only, since they lack the one most essential element of every contract, namely, the consent of the parties. The obligations and legal effect of a promise or engagement imported into a contract by force of a statute, as in this case, whereby the contracting parties agree to obey or execute some law, depend entirely upon the validity of the law. Every person is bound to obey the law, irrespective of any express agreement on his part to that effect; but he does not incur any liability or penalty for breach of an agreement to obey a void law. Such a promise or agreement cannot survive the statute upon which it is founded, but must fall with it, since it can have no independent existence arising from the consent of the parties or the meeting of minds. No one would claim that the terms of the contract precluded the relator from the recovery of what is due to him for the work but for the law which is behind it. The effect of this statute was to make the city a trustee or instrument for the enforcement of the law in the interests of the persons for whose benefit it was enacted, and thus the powers and functions of the municipality are employed for purposes foreign to those for which they were created and exist under the constitution. The order of the appellate division should be affirmed, with costs.

Landon, J. I concur in the opinion of Judge O'Brien. I think it proper to state some considerations which I suppose to be pertinent:

1. The city has a governmental capacity, and the business capacity incidental to it. Its governmental capacity does not extend to the wages private persons shall pay their servants, and hence it cannot, in its business capacity, fix such wages.

2. The relator, in taking care of his part of the contract, is exclusively engaged in minding his private business. The city

cannot interfere with him except upon his failure to render proper performance of the work, or of some connected requirement affecting the public convenience or safety. Hence he is an independent contractor, and thus free to hire his own workmen as any other person may.

3. In its business contracts with a person the state or city is on one side of the contract and the person on the other. Each should render to the other the promised equivalent. Here the contractor has rendered to the city all the equivalent that it has capacity to receive. It cannot ask for more in behalf of itself, but it assumes a grievance in behalf of others, of whom it is neither guardian nor trustee. They are free men. It will be timely to hear them when they ask a hearing. The city thus asks for more than the equivalent promised to it. The vice of its position is that it seeks to thrust into a business contract, in addition to its subject-matter, control over the contractor's independent relations with other people. It does not hire his servants, and therefore cannot fix their wages.

4. The state, like an individual, may contract for the kind and quality of materials to be furnished in a given construction; otherwise, it may not get what it wants. It is, I submit, false analogy to assume that it has the like right to dictate to the contractor the wages he shall pay his workmen. They are not parties to the contract. It is not made for their benefit. The state cannot directly give them gratuities, and therefore cannot indirectly do so through the contractor; much less by extortion masked under the power to contract. Conceding that the state has a benevolent sentiment of concern in the matter of workmen's wages, that sentiment has no relation to the subject-matter the contractor has agreed to deliver; and, because it has none, the contrary claim of the state has no just basis. The contract calls for a certain kind of work by Rodgers, the relator. If he furnished it, it is of no more business concern to the state than to the individual whether he has meantime furnished his workmen with tooth brushes or paid them extra wages.

5. An officer is a part of the personal force by which the state act, thinks, determines, administers, and makes its constitution and laws operative and effective. He is an arm of the state, and always on its side. The contractor, laborer, or employee deals at arm's length with the state, and is always on his own side, not necessarily opposed to the state, but with respect to his service owing it no oath-bound duty, but simply the contractual duty to perform as he has agreed to do. The state can fix the salaries it will pay its officers, but no more than the individual can fix the wages it will pay employees. It can fix the wages it will offer,—and its policy is to fix them high enough to secure acceptance by the workmen,—but without such acceptance the wages cannot be fixed. They must remain a matter of contract. The power to fix the

rate, as distinguished from offering it, includes a low rate as well as a high one, and thus becomes despotic in substance, however dormant in exercise.

6. When an independent contractor with the state or city has performed his work on time, complete in every detail according to the contract, free from every lien and incumbrance, then, if the state or city can escape paying him because he has not voted a certain ticket, made contribution to a certain political party, or paid his workmen any more than they agreed to work for, the state can compel him to choose between losing his earnings or his natural liberty to make such honest contracts with his fellow men for their services as they are willing to make with him. To deny an independent contractor such liberty and protect others in it, is to deny him the equal protection of the laws.

7. To enact that no less than the prevailing rate of wages shall be paid by such contractor is an indirect method of excluding from his employment those who can earn something, but not so much; since he will not hire those who cannot do the work of an able-bodied man.

8. It is admitted that the contractor paid less than the prevailing rate of wages. No doubt that is true if the highest rate among the best workmen is the test. But what is the prevailing rate of wages? Is it the rate that the best workmen, or the largest mass of workmen, or the average workmen can command? Does it depend upon ability? If so, of which grade? Or upon numbers? If so, is it the majority of all or of a class? And, if of a class, of which class, and why? What rights have those who do not come within the dominant class? Does it depend upon supply and demand? Upon fair competition? How can we tell? Must we not conclude that a statute which simply says "the prevailing rate of wages" is too indefinite in its meaning to be made the test or condition of a penalty or forfeiture? When a penal statute leaves doubtful the kind of act it denounces, the accused is entitled to the benefit of the doubt, and, though he may not insist upon the doubt, the state, out of self-respect, should refrain from inflicting the penalty.

Parker, C. J. (dissenting). The reasoning by which the decision about to be made is sought to be supported fails to persuade me that it is other than a judicial encroachment upon legislative prerogative; for it is that, and nothing less, if the statute does not offend against either the federal or the state constitution. If the statute, which seems to be regarded by some as vicious in its tendency, attempted to regulate the question of wages as between citizens of the state, so as to affect even in the slightest degree the basis on which one citizen should contract with another, then not only would much of the discussion which this statute has invoked be relevant, but the decision about to be made would be unquestionably sound. The legislature, however, intended

nothing of the kind, and the statute not only omits to express any such purpose, but it is so carefully guarded as to leave no room for doubt that the legislature, appreciating the limits of its authority, intended to and did simply provide with certainty that those who work directly for the state, or upon public works within the state, shall receive that which may be termed "going wages" in the locality in which any particular public work is being carried on, as will at once appear from a reading of the statute, so much of which as is germane to the question under discussion being set out in the statement of facts. In other words, the legislature, which is vested with the power to direct the conduct of the business operations of the state, by this statute has not only declared it to be the policy of the state as a proprietor to pay the prevailing rate of wages, but has enjoined upon its several agents and agencies the duty of executing this policy. An attack upon this statute, therefore, assails the right of the state as a proprietor to pay such wages as it chooses to those who either work for it directly, or upon any work of construction in which it may be engaged. No one has presumed to challenge the right of an individual either to pay the prevailing rate of wages in his locality, or, if he concludes to have his work done by contract, to refuse to award it to a contractor who will not agree to pay the going wages to all employees that may be engaged upon the work. But the state seems to be regarded in some quarters as having less power as a proprietor than an individual, so that what an individual may contract to do in the performance of his own work the state itself may not do when it assumes the role of proprietor, and attempts the construction of important public work.

Now, having called attention to the fact that the statute, by its terms, is expressly limited to laborers employed upon the work of which the state, in its entirety or through some subdivision thereof, is the proprietor, we come to the question whether there is any provision of either the federal or state constitution that so far restricts the power of the state in constructing its buildings or other public works that it has less liberty of action than one of its citizens. That it has, to say the least, as much power as a proprietor as has any of the individuals of which its citizenship is comprised, would seem to be a self-evident proposition. But, as evidence is not wanting that it is not so regarded by others, the subject must have some consideration. In 1889 the legislature provided by statute that from and after the passage of the act the wages of day laborers employed by the state, or any officer thereof, should not be less than two dollars per day. Chapter 380, Laws 1889. It is difficult to imagine from what source the idea could have been born that this statute was unconstitutional, in view of the fact that it was known of all men that the legislature had always fixed the compensation of its executive, legislative, and judicial officers, and had provided from the

beginning what compensation, if any, should be paid to all of the county and city officers throughout the state. Indeed, the compensation for every kind and character of service whatsoever had always been fixed either by the legislature directly or through agencies created by it; the original source of power in all cases being the legislature. Nevertheless, there were those who conceived the absurd idea that there was some distinction between the compensation for day laborers and the compensation for all others engaged in the service of the state, and so the demand of one Clark, who was employed upon the canals, for the compensation fixed by the legislature, was challenged, and finally came to this court, where the question was put at rest by a unanimous decision, which held that: "There is no express or implied restriction to be found in the constitution upon the power of the legislature to fix and declare the rate of compensation to be paid for labor or services performed upon the public works of the statute. That legislation is doubtless open to criticism from the standpoint of sound policy and expediency, but the courts have nothing to do with these questions, so long as it is not in conflict with the constitution; and we think that a general law regulating the compensation of laborers employed by the state, or by officers under its authority, which disturbs no vested right or contract, was within the power of the legislature to enact, whatever may be said as to its wisdom or policy." Clark v. State, 142 N. Y. 101, 36 N. E. 817. Now, certainly it need not be argued that, if the constitution contains no restriction "upon the power of the legislature to fix and declare the rate of compensation to be paid for labor or services performed on the public works of the state," there is nothing in the constitution to restrict the power of the legislature in declaring that "the rate of compensation to be paid for labor or service performed on the public works of the state" "shall [in the language of the statute] not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about, or in connection with which labor is performed, in its final or completed form, is to be situated, erected or used." So, if authority be needed, we have the authority of this court that the legislature has the power to provide that the policy of the state shall be to pay the going rate of wages in the locality in which a public work is to be done, and to command its agents to obey its directions in that regard. For illustration: Were it now engaged in the erection of a new capitol, the public officer or officers having in charge the construction by appointment of the legislature would, under the authority of the Clark Case, be obliged to pay the prevailing rate of wages in Albany; and if, in the course of construction, it should be determined to do some part of the work by contract,—as was the case during the last year of work upon the capitol,—those having in charge the construction would be obliged to provide

in the contract that the contractor should pay the prevailing rate of wages in Albany. Of course, a contractor would not be obliged to accept a contract under such terms, but certainly would do so if he wished the work, for the state as proprietor would have the right to impose any terms it might choose as a condition of awarding the contract, just as an individual might do. Terms might thus be imposed which would be wise or very foolish for both the state and the contractor, in the estimation of the latter; but it is the proprietor's right to be unwise if he so wills, in which respect the state is perhaps, both in theory and practice, on an equality with its citizens. The provision in the contract requiring, in effect, that he should pay the going wages, would, of course, interfere with his liberty to hire men for lower wages. So a provision that he must use a certain brand of cement, which is no better and costs more than other brands, would interfere with his liberty to buy first class cement at a lower price than the brand named. A provision that some or all of the figure work cut out of stone should be done by workmen from Italy would, perhaps, interfere with the employment at less expense of men of equal or greater skill at home, who could do equally good or better work, and to that extent his liberty to so contract as to make a greater profit for himself, without injury to the proprietor, would be interfered with; but it is interfered with only because the assent to the proprietor's wishes, and contracts that it shall be so, and hence his liberty is not interfered with at all within the meaning of the constitution, for he has solemnly covenanted in his agreement that he shall not be at liberty to do anything in the course of the performance of the contract that shall be contrary to the wishes of the proprietor as expressed in the written contract.

I have yet to hear an argument from any quarter offered for the purpose of showing that the state as a proprietor could not, in the erection, for instance, of a new capitol, fix the wages to be paid by its contractors, provide that its sculptors should come from Italy, its decorators from Paris, its stone from specific quarries in Massachusetts, and its cement from England, when perhaps better results could be obtained should only residents of this state be employed, and the material purchased within its own borders. But it is said that this statute goes further, and applies not only to the work undertaken by the state at large, but also to the public works carried on in the several municipalities of the state; the particular case before the court growing out of a contract made between the city of New York and the relator, by which the latter agreed to regulate and grade West 135th street in that city from Amsterdam avenue to the Boulevard. The authority of the state, however, is supreme in every part of it, and in all of the public undertakings the state is the proprietor. For convenience of local administration, the state has been divided into municipalities, in each of which there may be found local

officers exercising a certain measure of authority, but in that which they do they are but the agents of the state, without power to do a single act beyond the boundary set by the state acting through its legislature. Charters are given to cities, by means of which are created what are known as "municipal corporations"; but the creation is solely for the purpose of doing the work of the state in the particular locality affected, and in the creation of these agencies the legislature designates the number of officers, determines what they shall be called, prescribes what particular portion of the municipal work each shall do, fixes their compensation, and provides a method by which shall be chosen a proper amount of assistance, clerical and otherwise, to perform the work, and from time to time enlarges or restricts the fields of labor of the several officers. It also, from time to time, by special enactment, authorizes undertakings of large public importance, not contemplated, perhaps, at the time of the granting of the charter or at the time of a general revision of it. If the legislature becomes dissatisfied with the general working of a charter, it may change it, or create a new one, for it is possessed of supreme authority to provide the method by which the municipal affairs shall be conducted, and to determine what great public works, if any, shall be undertaken. If it shall determine that the city is in need of a large supply of pure and wholesome water, the legislature, and the legislature alone, may provide the machinery by which that result may be accomplished. In the doing of it the legislature may devolve the administration of the details of the work upon the local municipal officers already in existence, or it may select another agency, without even consulting the wishes of either the taxpayers or the voters of a city; as was the case in the building of the new aqueduct, which was authorized by chapter 490, Laws 1883. The act was entitled "An act to provide new reservoirs, dams and a new aqueduct, with the appurtenances thereto, for the purpose of supplying the city of New York with an increased supply of pure and wholesome water." It contained full authority for the execution of this vast undertaking, which was expected to and did cost the city of New York very many millions of dollars, under the direction of six commissioners, named in the act, upon whom was devolved both the power and the duty of effectuating the purpose of the legislature as expressed in the statute. The constitution has, of course, imposed some restrictions upon the legislative power,—such, for instance, as that the legislature shall not authorize the construction of a street-surface railroad without the consent of the local authorities and 50 per cent. of the abutting property owners, or, in lieu thereof, the consent of the appellate division of the supreme court. But, prior to the incorporation of such a provision into the constitution, the legislature had the power, and until 1850 exercised it, of authorizing the construction of street-surface railroads without the consent of either

the local authorities or the property owners, as will appear from an examination of the statutes referred to in Ingersoll v. Railroad Co., 157 N. Y., at page 466, 52 N. E. 545, 43 L. R. A. 236. Similar instances almost without number might be multiplied, all of which would serve as illustrations merely that the state, acting through its legislature, has absolute power and control over all the public works within the state, undertaken and carried on with public funds, whether the work be paid for by a municipality or by the state at large; and that those who let the contracts, superintend the construction, audit the bills, and pay them, are in such work but the agents of the state, whether the agency be created by the provisions of a charter or by special enactment. If authority be needed in support of this proposition, it may be found in Williams v. Eggleston, 170 U. S. 304, 18 Sup. Ct. 617, 42 L. Ed. 1047. At page 310, 170 U. S., page 619, 18 Sup. Ct., and page 1049, 42 L. Ed., the court says: "A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and as such it is subject to the control of the legislature." Authority to the same effect may also be found in cases in this court of which Mayor, etc., v. Tenth Nat. Bank, 111 N. Y. 446, 18 N. E. 618, is a type. In that case the question presented was whether the city of New York could be compelled by the legislature to pay to the Tenth National Bank moneys that it had advanced without authority of law to the county commissioners, which were in part misappropriated by them, the balance of the moneys being used in the construction of the court house in New York City. The act of the legislature requiring the city to pay to the bank the moneys advanced by it was upheld in this court, and in the course of the opinion the court said: "Municipal corporations are creatures of the state, and exist and act in subordination to its sovereign power. The legislature may determine what moneys they may raise and expend, and what taxation for municipal purposes may be imposed; and it certainly does not exceed its constitutional authority when it compels a municipal corporation to pay a debt which has some meritorious basis to rest on." Other authorities in which the proposition is, in effect, either decided or asserted that a municipal corporation is simply an agency of the state for the conduct of the affairs of government, and, therefore, subject to the control of the legislature in all respects except as expressly limited by the constitution, are: In re New York Protestant Episcopal School, 46 N. Y. 178; Terrett v. Taylor, 9 Cranch, 43, 3 L. Ed. 650; Payne v. Treadwell, 16 Cal. 221; Jones v. Town of Lake View, 151 Ill. 663, 38 N. E. 688; Mayor, etc., v. Groshon, 30 Md. 436; Groff v. Mayor, etc., 44 Md. 67; State Bank v. City of Madison, 3 Ind. 43; President & Council of City of Paterson v. Society for Establishing Useful Manufactures, 24 N. J. Law, 385; Cleveland v. Board of

Finance & Tax'n of Jersey City, etc., 38 N. J. Law, 259; In re Dalton (Kan. Sup.) 59 Pac. 336. In the latter case the petitioner was arrested for violating the provisions of chapter 114 of the Laws of 1891 of the state of Kansas, which provided that eight hours should constitute a day's work for laborers, workmen, mechanics, and other persons employed by or on behalf of the state of Kansas, or by or on behalf of any county, city, township, or other municipality in the state. He sought to be relieved from trial through habeas corpus proceedings, claiming that the act was unconstitutional. The court thought that the statute was constitutional, and in the course of the opinion the court said: "Whatever orders the state may give directly to its own agents it may require of its political subdivisions, instrumentalities of said government, such as counties, cities, townships. These subdivisions are merely involuntary political or civil divisions of the state, created by statute to aid in the administration of government. 'A county is one of the civil divisions of a country for judicial and political purposes, created by the sovereign power of the state of its own will, without the particular solicitation, consent, or concurrent action of the people who inhabit it; a local organization, which, for the purpose of civil administration, is invested with certain functions of corporate existence.' It has been held competent for the legislature to establish a state road, and cast the cost and expense thereof upon the county in which the road lies, without the consent of the officers or people of the county. And in like manner it may require the county to build a certain kind or number of bridges at specified places, another county to build roads in a particular locality, and another to build public buildings; and for this and other public purposes the counties and other municipalities could be required to levy a tax, and make other provisions for the payment of such improvements. Indeed, everything relating to the management of counties, cities, and townships not defined and limited by the constitution may be taken away by the state, acting through its legislature; and as to these political divisions and their agents the legislature has the same power that it possesses over state officers. We conclude, therefore, that the statute under consideration is a mere direction of the state to its agents, and a proper exercise of its power in that respect."

If the views so far expressed be sound, it would seem to follow that the position taken by the state in enacting this statute is precisely like that of an individual who, for any reason, determines that, if it be a little more than honest, as that term is usually employed, it is not more than just, to pay for a thing what it is fairly worth, and that the principle should be applied as well to the compensation of labor as to the payment for material, and hence decides that in construction work he will pay the market price. The state, having determined upon such a course of action by this statute, directs

its agents and agencies, wherever throughout the state they may be situated, that in the doing of a public work they shall pay the going wages whenever the work is to be done by day's work, and, whenever it is to be done by contract, then the agent, wherever situated, shall put into the contract that it executes by authority of the state a provision that the contractor shall pay such rate. There are no authorities in this state that militate against the position that I have taken. On the contrary, such as there are support it. In People v. Warren, 77 Hun, 120, 28 N. Y. Supp. 303, the defendant had been charged before a police magistrate with a violation of section 504, c. 105, Laws 1891, entitled "An act to revise the charter of the city of Buffalo." That charter provided, among other things, that "in contracting for any work required to be done by the city, a clause shall be inserted that the contractor submitting proposals shall bind himself in the performance of such work not to discriminate either as to workmen or wages against members of labor organizations, or to accept any more than eight hours as a day's work, to be performed within nine consecutive hours." The defendant having been convicted, an appeal was taken to the general term, Fifth department, where the argument was made that the statute was unconstitutional because offending against the provisions of section 1, art. 14, of the constitution of the United States, and of the provisions of section 1, art. 1, of the constitution of the state of New York. It was held by a unanimous court that the statute was constitutional, and the judgment of conviction was affirmed. Subsequently an unsuccessful attempt was made to secure a different result through the instrumentality of a writ of habeas corpus. I take an extract from the opinion, which was written by Judge Hatch, because it is in point on the next proposition that I propose to discuss: "It is said that defendant is an independent contracter, and consequently the rules we have invoked have no application to the case. If this were conceded, it might not be possible to answer the claim. But the assertion itself, as I view the facts, is far from being true. In the sense that the defendant is doing work for the city of Buffalo under a contract to furnish all material and labor in making a public improvement for a given sum, it is a fact; but that it is relieved from the obligations imposed by the state upon the city of Buffalo, and assumed by it, is not true as matter of law. * * * The city said to the defendant, and to all other contractors, when it invited the bids for the performance of the work: 'The statute is one of the conditions which must be complied with, and an obligation which must be assumed by the contracting party. The defendant was not obliged to bid. The conditions imposed applied equally to all who should bid. The act of bidding was with full knowledge, and voluntary. Under these conditions defendant made its bid, and, when awarded the contract, voluntarily executed the same, and assumed the

obligations imposed upon the city by the statute. How can it be said that he was an independent contractor, freed of obligations? He was an independent contractor, but he is not independent of the obligations imposed by the contract." People v. Beck, 10 Misc. Rep. 77, 30 N. Y. Supp. 473. It should also be said, before passing to the consideration of the contract, that the judge before whom this matter came at special term was of the opinion that the act is constitutional, and, while there was a difference of view in the appellate division as to certain questions, not one of the judges of that court expressed an opinion that the state, in so far as it directed its agents to insert a provision in the contract that the prevailing rate of wages should be paid, acted beyond its power. Indeed, in the prevailing opinion it is said: "I am satisfied that the legislature has power to prescribe the form of contracts which shall be made by municipal corporations with those entering into contracts with it. No one is bound to enter into such a contract, or to do work for a municipal corporation; but, when he does, he must accept the terms of the contract as prescribed by law, and, if he voluntarily makes a contract by which he is to receive pay only upon condition of his performing certain obligations or doing work that he agrees to do in a certain way, the contractor certainly cannot complain if the city refuses to pay except upon his compliance with the terms of the engagement."

Since the argument there has been evolved the notion that the few constitutional limitations upon the power of the state to control at will through legislative action all the affairs of municipalities in some way helps out the contention of the majority that the state is not the proprietor in the grading and construction of the street in question. It seems to me that the effect of these exceptions is to prove the rule, if proof be needed, that the state can do what it chooses in respect to public improvements anywhere within its borders, whether the territory affected be within city limits or in the rural sections of the state, provided only that it does not transcend the limitations that the people have seen fit to place upon that power by means of the constitution. That instrument will be searched in vain for any restrictions upon the power of the legislature to grade or improve highways. The legislature may provide for the building of bridges over streams separating counties, or towns, or both. It may do this at the expense of the state, or at the expense of the town affected, or of the adjoining counties, or the expense may be apportioned in such manner as the state sees fit. It may build and improve roads at the joint expense of the state and the locality more immediately benefited by the construction of the road, or part of the expense may be assessed upon the property of individuals abutting upon the improved highway; and in cities it may determine to have streets graded and improved, and the entire expense assessed upon the property in the neighborhood which is supposed to

benefit by the improvement; or it may assess the entire sum upon the city, or apportion the cost between the two. But, however the moneys necessary to pay the expense of such an improvement may be raised, it is the state that authorizes the improvement, selects the agency by which it is conducted, and alone determines the source from which the money needed to pay the expense shall come; and its power in that respect has no limitation whatever.

The prevailing opinions discuss a question which is not up for decision, namely, whether the legislature has the power to provide that the municipal authorities shall pay to their employees going wages. As the discussion which that question has received is, in my opinion, obiter, I shall not refer to it further than to say that I dissent from the views expressed in relation thereto on the ground that the statute offends no provision of the constitution when it undertakes to provide that the city shall pay the prevailing rate of wages to those who work for it. Who denies the power of the legislature to fix the rate of compensation for the mayor, the comptroller, the police commissioner, the clerk, the attendant, and the messenger? If any one does, I have not heard him. Why may it not then fix the rate of compensation of the engineer in charge of its heating and ventilating apparatus, its skilled mechanics, or its street sweepers? Where, in the constitution, is to be found the provision that so discriminates between the classes into which the public service is divided as to allow the legislature to provide certainty and stability of compensation as to the one and denies a similar power as to the other? My attention has not been called to such a provision, nor have I been able to find it after diligent search.

I have considered the constitutionality of the statute, because it has been insisted—as I think, erroneously—that the feature of the statute which is in controversy here is unconstitutional. But if, on the other hand, it were to be conceded that it is unconstitutional, I do not see how it could avail this relator. If the contract were silent on the subject, and the claim made was that the contractor could not recover for work performed because he had not complied with the provisions of the statute requiring contractors to pay the prevailing rate of wages, then he would not only be in a position to attack the constitutionality of the statute, but an adjudication that it was unconstitutional would relieve him from the necessity of paying the prevailing rate of wages. But that is not this case. In the contract between the city and this relator it is agreed in terms that "the wages to be paid for a legal day's work, as hereinbefore defined, to all classes of such laborers, workmen, or mechanics upon all such public work, or upon any material to be used upon or in connection therewith, shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about, or in connection with

which labor is performed, in its final or completed form, is to be situated, erected, or used." And it was further in terms agreed that "this contract shall be void, and of no effect, unless the person or corporation making or performing the same shall comply with the provisions of the labor law"; so that not only in terms did the contractor agree to pay the prevailing rate of wages, but the agreement also in effect made the provisions of the labor law a part of the contract. Whether, therefore, the statute was unconstitutional or not, there was nothing to prevent this relator from consenting to the incorporation of the phraseology of the statute into the contract, and, when he did that, and voluntarily executed the contract, as in this case, he cannot effectively plead as an excuse for the violation of his contract that, inasmuch as certain of its provisions are void when embodied in a statute, they are also void when incorporated into a voluntarily executed contract. While the majority of the appellate division agreed that the statute was constitutional in so far as it provided for the payment of the prevailing rate of wages, and also that the relator, having voluntarily executed the contract, he is entitled to payment for work done only upon condition of his performing its stipulations, still they were of the opinion that the relator was entitled to a mandamus because the officers of the municipal corporation had failed to avoid the contract prior to the institution of the proceeding. If the conclusion of the majority was wrong in this respect, they conceded that the defendant rightly succeeded at special term, and, as it seems to be very clear that it was wrong, I shall content myself with a brief presentation of the reasons, and shall omit all reference to the question (also discussed) whether the contract became void by direct operation of the statute upon the contract and its conceded breach. If the statute purported to accomplish such a result, the court thought that it might be unconstitutional. But I shall not consider whether it does purport to accomplish such a result, or whether, if it did, it would offend against the constitution; for, as I view it, the question is not before us. Certainly, it cannot affect the disposition of this matter if what the comptroller did operated to avoid the contract. It is because I think he did all that the situation required in order to enable the city to take advantage of the relator's breach of the contract that leads me to a different result than that reached by the appellate division, for we alike agree on the constitutionality of the statute, so far as it is involved in the proceeding, and in the binding effect of every provision of the contract. It is not easy to appreciate the argument that admits the validity of the contract, its open violation by the relator, concedes that the provision is clear and unambiguous that declares it shall be null and void in the event of such a violation, and still contends that a recovery may be had in the face of the defense urged by every legal method, viz. that the relator cannot recover because the

contract has become void by his act. What act it was necessary for the comptroller to do in order to take advantage of the defense the relator had furnished other than first to refuse to pay, and afterwards to defend on the ground that the contract was void, owing to the relator's violation of it, has not been suggested. It has been found easier, no doubt, to say that the comptroller, as the fiscal officer, had to do something, than to point out the thing he had to do. It is the relator's violated agreement which entitled the defendant to claim that this contract is no longer of any effect; for it must not be forgotten that this relator comes into court admitting that he has violated the contract by failing to pay the prevailing rate of wages, as he agreed to do, and by his contract he agreed that the effect of his failure to do so should cause the contract to become void, and of no effect.

The argument that the relator is entitled to a mandamus against the comptroller because he had not avoided the contract before this proceeding was instituted, seems to me without force. It appears affirmatively that the comptroller was not informed that the relator was violating his contract until the 19th day of April, 1900, and that he set on foot an investigation for the purpose of learning the truth of the matter immediately thereafter, with the result that the information received by him was fully confirmed. Now, the certificate made by the commissioner of highways certifying to the correctness of the relator's account, showing a balance due, to secure a warrant for which this proceeding was instituted, was dated April 23, 1900, or only four days after the comptroller was first advised of any act leading him to suspect that the relator was violating the contract. From these facts it is apparent that there was nothing in the situation to justify the conclusion that the comptroller allowed him to go on with his work after knowledge on the part of the comptroller that it was within his power to avoid the contract on behalf of the municipality. On the contrary, it is apparent that no part of the work for which a warrant is claimed was performed after the comptroller's knowledge of the relator's default. This proceeding was instituted about three weeks afterwards, and hence it is manifest that, so far as this claim is concerned, the relator has nothing to complain of in the conduct of the comptroller, assuming, without admitting, that a complaint of that general character could have any legal value towards restoring to life a void contract. This proceeding was instituted against the comptroller because he refused to deliver to the relator a warrant for the amount of the certified account. The reason for it is set up in his return, and is to the effect that the relator had executed a contract by which he had agreed that, in the event of his failure to perform certain of its terms and conditions, the contract should be void; that he had failed to comply with such terms; and that hence the contract is void, and the city not liable. Now, if there is

anything else that the comptroller was bound to do under the circumstances in order to get rid of paying the amount claimed to be due under a contract that had become void, it has not been pointed out. He resisted payment both before and after the commencement of legal proceedings, on the ground that the contract had become void because of the conduct of the contractor, and that is all he was obliged to do in order to relieve the city from making further payments under a void contract. If the facts were, as assumed by the learned judge at the appellate division, that the city authorities, with knowledge of the violation of a contract which authorized the city to treat it as void, nevertheless permitted the contractor to go on with his work, by which the amount in question was earned, it might very well be that a court of equity would undertake to relieve a party from the loss that would otherwise result, on the ground that it was the duty of the officers of the city to speak, and not to hide their intentions for the purpose of getting work for nothing out of the contractor. But those considerations have no place in a proceeding by mandamus, where the relator can only succeed by establishing a clear legal right to that which he demands. I advise a reversal of the order of the appellate division and an affirmance of that of the special term.

Haight, J. (dissenting). If the labor law, so called, is properly construed in the prevailing opinion, it may be that the conclusion reached is justifiable. If the wages provided for by the statute to be paid laborers has reference only to those who are in the prime of life, and in the full possession of their physical powers, then its effect may be to exclude from employment, and the means of earning a livelihood, laborers who have passed the prime of life, and have suffered a partial impairment of their physical powers, and thus create a class distinction which is not only objectionable, but vicious. I, however, do not think that the statute should receive such a construction. It first fixes the number of hours that shall be deemed a legal day's work, and then provides that "the wages to be paid for a legal day's work as hereinbefore defined to all classes of such laborers, workmen or mechanics upon all such public works, or upon any material to be used, or in connection therewith, shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about or in connection with which such labor is performed in its final or completed form, is to be situated, erected or used." It will be observed that the statute expressly relates to "all classes" of laborers. This includes the old and the young, as well as the middle-aged and those in the full possession of their powers. But it is claimed that they all must be paid the same wages per day, and that this will operate to exclude from employment all those who have passed their prime, and who are unable to perform as much labor as those who are strong and

vigorous; but such does not appear to me to be the meaning of the statute. It does not provide that each laborer shall be paid the same wages. It is that they shall be paid the "prevailing rate." What is the "prevailing rate"? The Century Dictionary defines the word "prevailing" as "prevalent; current; general; common." It is the prevailing, current, general, or common rate; in other words, it is the market rate, or that which the services are fairly and reasonably worth. Each laborer must, therefore, be paid what his services are worth in the market in that locality. If he is in the prime of life, in the full vigor of his manhood, and able to perform a large day's work, he is entitled to receive the full value thereof. If he has passed his prime and vigor, and consequently cannot earn so much, he is still entitled to receive the value of such services as he is able to perform. If the prevailing or the market rate means the reasonable value, it, in the absence of a contract expressly fixing the rate, is just the amount which a court of law would award as damages in an action to recover pay for services rendered; and to this extent the provision is but the re-enactment of a part of the common law. Under this construction of the statute there is nothing in its provision that is objectionable or harmful. It merely gives to the laborer that which he earns, and nothing more. It is only what justice and good morals demand. It renders to the servant that which is properly his, and does not deprive the state or any of its municipal governments of any money or property belonging to it. It may be that the statute was intended to prohibit the making of contracts fixing the rate of wages at a less sum than that which the laborer was fairly and reasonably worth, but I know of no provision of the constitution, either federal or state, which prohibits the legislature, in sustaining a just public policy, from enacting that the state or the municipal governments thereof, or persons contracting therewith for the performance of public work, shall not, through contract or otherwise, take advantage of the necessities of the poor and laboring classes, and compel them to take employment for wages less than their services are fairly and reasonably worth in the locality.

The statute under consideration contains a clause requiring persons making contracts for the doing of public work to insert in the contract a provision requiring the payment of laborers at the prevailing rate. Possibly, the legislature cannot accomplish through indirection that which it is prohibited from doing directly; but, if I am correct in my view, the legislature may, as part of its public policy, by a direct provision require the payment in full of the value of the services rendered to the state or a division thereof, or upon any of the public works therein. This view of the statute is an answer to the contention that it authorizes the appropriation of the money or property of a city government to other than city purposes. The laborer

who performs work for a city government or upon a contract upon public works of the city is entitled to receive the value of his services rendered, and, so long as the city is not required to pay him a greater sum, the payment is for a city purpose, and such payment is not an appropriation for any other purpose. I favor a reversal of the order of the appellate division.

Bartlett and Vann, JJ., concur with O'Brien and Landon, JJ., for affirmance, and Martin, J., concurs with O'Brien, J. Parker, C. J., and Haight, J., read dissenting opinions.

Order affirmed.

CITY OF NEW ORLEANS
v.
HOP LEE.

(Supreme Court of Louisiana, Jan. 21, 1901.)

[29 So. Rep. 214.]

Ordinance—Inspection of Laundries—Validity.—It is competent for the city council of New Orleans to enact ordinances for the cleanliness and reasonable inspection of washhouses or laundries, and to impose a reasonable fee to cover the cost of such inspection.

(Syllabus by the Court.)

Appeal from recorder's court of city of New Orleans; James Hughes, Judge.

Hop Lee was convicted of violating an ordinance of the city of New Orleans, and appeals. Affirmed.

Rufus J. Paddock and Edward Barnett, for appellant.

Joseph E. Generelly, for appellee.

Blanchard, J. This is an appeal from a sentence imposed for noncompliance with the requirements of a city ordinance. The ordinance in question is one adopted by the city council of the city of New Orleans in November, 1899, known as "Council Series No. 15,709," and its object is to regulate the conducting of the washhouses or laundries of the city. The purpose of the enactment is to enforce the observance of sanitary conditions at such places. To this end, among other things, the ordinance provides a system of inspection of laundries. It is made the duty of the board of health of the city to cause to be made weekly a thorough inspection of thepremises used for such purposes, and authority is given the board to collect from the owners of such establishments a fee sufficient to cover the cost of inspection, not to exceed 25 cents for each inspection. The concluding section of the ordinance declares that any person violating any of the provisions of the same, or failing to comply with any of its requirements, shall be liable to a fine not exceeding $25, or to imprisonment not exceed-

ing 30 days. Defendant is the proprietor of a laundry. His premises were inspected by an officer of the board of health pursuant to the requirements of the ordinance, and for the inspection the fee of 25 cents was demanded. He refused to pay, and was summoned before the recorder. To the proceedings thus instituted against him he filed a demurrer, alleging the ordinance in question, particularly section 5 thereof, to be unconstitutional, and further denying any authority in the city council to enact the same. The court overruled the demurrer, and proceeded to the trial of the case, with the result that defendant was found guilty, and sentenced to pay a fine of five dollars, and, in default of payment, that he be imprisoned for a period not exceeding 11 days; whereupon he prayed for and was granted a suspensive appeal to this court.

With regard to the contention that it is not competent for the municipality to enact the ordinance in question, even if the authority to do so did not exist under the general police powers of the city, we find abundant warrant for it in section 14 of the city charter (Act No. 45 of 1896). With regard to the averment of unconstitutionality of the ordinance and of its section 5, we find that the fee of 25 cents imposed upon the proprietors of laundries is purely and simply "to cover the costs of inspection." It is neither a tax nor the imposition of a license for revenue purposes. This inspection is made weekly, and the requirement is in the interest of the public health. It is considered reasonable, and not oppressive. This is not the case of the city attempting to use its police power to enforce the collection of revenue, and the authorities cited in appellant's brief (Municipality No. 1 v. Pance, 6 La. Ann. 515; State v. Patamia, 34 La. Ann. 750; State v. Manessier, Opinion Bk. 53, p. 237; Mestayer v. Corrige, 38 La. Ann. 711; State v. Blaser, 36 La. Ann. 365; State v. Zurich, 49 La. Ann. 453, 21 South. 977) do not apply. See concurring opinion of Bermudez, C. J., in State v. Blaser, 36 La. Ann. 366, and authorities there cited. Also Morgan v. Louisiana, 93 U. S. 217, 23 L. Ed. 860. Judgment affirmed.

BOARD OF POLICE COMMISSIONERS

v.

WAGNER.

(*Court of Appeals of Maryland, March 8, 1901.*)

[48 Atl. Rep. 455.]

Power to Seize Property in Exercise of Police Power.—Laws authorizing the seizure and destruction of property when necessary to protect the health, morals, or peace of society are not in conflict with constitu-

tional limitations prohibiting the taking of property without due process of law, since such laws are within the police power of the state.

Replevin to Recover Property Seized in Exercise of Police Power.—Replevin will not lie against the Baltimore police commission to recover a slot machine intended and designed for gambling, and incapable of any legitimate use, which is seized and held by such commission as evidence against defendant, without the institution of criminal proceedings against the owner either before or after the seizure, since Baltimore City Charter (Acts 1898, c. 123) § 744, making it the duty of such commission to preserve the peace and to prevent crimes and nuisances, authorizes such seizure.

Appeal from superior court of Baltimore city.

Replevin by Henry Wagner against the board of police commissioners. From a judgment in favor of the plaintiff, the defendant appeals. Reversed.

Argued before McSherry, C. J., and Fowler, Boyd, Page, Pearce, Schmucker, and Jones, JJ.

Alonzo L. Miles, for appellant.

Gans & Haman and W. Calvin Chestnut, for appellee.

Page, J. This is an action of replevin to recover a musical slot machine. The third plea is that the article is "a gambling device or instrument intended and designed to be used by the plaintiff and others in violation of the gambling laws of the state, which can be put to no legitimate use, and was detained by the defendants in the discharge of their official duty to prevent such violation, and to be used, if necessary, as evidence against the plaintiff"; and the replication is that at the time the machine was taken "there was no charge pending against the plaintiff for any violation of the gambling laws of this or any other state; that the plaintiff was not arrested, nor has he since been arrested, nor any warrant issued for his arrest, on any such charge, nor has any such charge been preferred against him; and that the said machine was not taken and retained by the defendants for use as evidence against any other person." To this replication the defendant demurred, which being overruled this appeal was taken.

Case Stated.

The effect of the demurrer is to admit: (1) That the musical slot machine is a gambling device, "intended and designed to be used by the plaintiff and others in violation of the gambling laws of the state"; (2) that it can be put to no legitimate use; (3) that it is detained by the appellants in the discharge of their official duty to prevent such violation of the gambling laws of the state; and (4) that such machine was taken at a time when there was no charge pending against the appellee for a violation of the gambling laws of this or any other state, nor any warrant issued for his arrest, nor any charge preferred against him. The contentions of the re-

spective parties turn upon the question whether a machine of that character, seized summarily by a police officer, can be recovered in an action of replevin. The appellant contends that inasmuch as it is admitted by the demurrer that it is an instrument incapable of being put to any legitimate use, and was designed to be used by the appellee and others for violating the gambling laws of the state, it is an instrumentum malum in se, hurtful in character to the public peace and morals, and as such is subject to summary seizure and detention under the police power of the state; and therefore the action will not lie. It is fully sustained by the decisions in this court that the state has power to pass such laws as are necessary to protect the health, morals, or peace of society; and where the summary seizure, or even the destruction, of the offending thing is necessary for the public safety, may authorize that to be done; and such laws are not incompatible with those constitutional limitations which declare that no person shall be deprived of his property "without due process of law." Deems v. City of Baltimore, 80 Md. 173, 30 Atl. 648, 26 L. R. A. 541; Mugler v. Kansas, 123 U. S. 62, 8 Sup. Ct. 273, 31 L. Ed. 205. If, therefore, this principle must be assumed without further question, it is clear that if the police commissioners have been invested by the state with power to make seizure of property for the purpose of preventing crime, such authority can be amply sustained under the police power of the state, and its proper exercise would not be obnoxious to the constitutional provision against seizing property without due process of law. The question here confronting us, therefore, is not a constitutional question, but one which depends upon the authority which the state has conferred upon the police commissioners. By the 744th section of the charter of Baltimore city (chapter 123, Acts 1898) the duties of the board of police commissioners are defined. It is made their duty "at all times of the day and night" to "preserve the public peace, prevent crime and arrest offenders, protect the rights of persons and property, guard the public health, * * * prevent and remove nuisances, * * * see that all laws regarding pawnbrokers, gambling, intemperance, etc., are enforced," etc. An examination of the entire section will show that these and many other duties are imposed on them for the purpose of preventing the perpetration of acts which are prejudicial to the peace, order, comfort, and health of the public. Prevention of acts prejudicial to the general welfare is in fact their chief obligation. They must preserve order, protect the rights of persons and property, and prevent nuisances and crimes, etc. By what means they are to prevent crimes is not defined; but it is clear that in exercising such a power they must act in accordance with well-established rules of persons and property, so that the rights of the citizens shall not be invaded

Power to Seize Property in Exercise of Police Power.

under the pretense of protecting them. Subject to these limitations, they are charged with the duty of acting intelligently, astutely, and industriously in preventing every infraction of the law that would result in destroying or injuriously affecting the peace of society, or in the commission of crime. In the case at bar the property seized under the concessions of the demurrer is an instrument "intended and designed to be used by the plaintiff and others in violation of the gambling laws," and one of such a character that "it can be put to no legitimate use." It does not, therefore, belong to the class of articles that may or may not be used for legal purposes. If it did, the presumption could not be made that the owner intended it for illegal purposes; and, however the law may be otherwise, it is clear upon principle and authority that no seizure can be made as a preventive measure without it had first been properly established that the article was procured and held for an illegal purpose. But, if the article be of such a nature as to be incapable of being used for legal purposes, the presumption, as matter of fact, would be that, being an unlawful article, it was intended for such uses only as it was capable of being put to; and in that event the appellee, to rescue himself from the charge of having in his possession an evil chattel, would be forced to show that he did not intend to use it at all, but was keeping it for some innocent purpose, —as a curiosity, for instance. In Com. v. Coffee, 9 Gray, 140, where a person was indicted for the larceny of brandy in Massachusetts, where liquor could not be legally sold, it was contended that, having been bought to sell again, it was not the subject of larceny. The court held that, notwithstanding it could not be legally sold, it was a property because it did not appear "that it was procured and held for an illegal purpose." In that case the owner did not forfeit his right to the property because he held possession of the liquor, but because the illegal purpose of the possession had not been determined in the method the law pointed out. In the case at bar there can be no such difficulty, because by the demurrer it is admitted the machine was held for an illegal purpose, and could not have been used for any other. Monty v. Arneson, 25 Iowa, 383. So, in State v. May, 20 Iowa, 308, a person was indicted for stealing liquor. The defense was that the sale of liquors was prohibited, but the court decided it was property that could be the subject of larceny, because "it may at any time be withdrawn as an article of trade, and be kept exclusively for private use." There are, however, "certain instances" in which "the law refuses its full protection to property because of its hurtful character, and no strict grounds of public policy." Thus, a burglar's or gambler's tools or counterfeit money may be seized and confiscated under appropriate acts. Schouler, Pers. Prop. § 24. It is difficult to perceive any sufficient reason for the denial of this principle. Why should a person be left in the possession of

ounterfeit money? To what use could it be applied, except n illegal use? If, on its seizure, the owner could show that it 'as not his bona fide intention to make any use of it at all, ut was only keeping it as a memento, or as a curious object, erhaps another case would be presented; but, until that is ıade clearly apparent, it would have to be presumed that he ıtended to use it for the illegal purpose for which it was reated, and for which it was only adapted. So, in the case t bar, no legal use can be made of the machine, and it would eem to follow, in the absence for proof to the contrary, that ıe appellee intended to put it to the illegal uses for which it 'as constructed, and for which alone it was capable of being sed; and this would be so even if it were not admitted, as it ; here, that its intended use was in violating the gambling ıws of the state. What more effectual means for preventing rime than to deprive the thief or the burglar of the instru- ıents of his evil trade? If at midnight a policeman find person on the streets, laden with burglar's tools hidden on is person, is he to permit him to go his way with his illegal urden? Is not the seizure of these instruments of crime a roper and reasonable thing for him to do? Would it not be onducive to the prevention of crime for the police officer, harged with the enforcement of the law and the prevention f crime, to do that? Must the owner be allowed to retain hem until it can be shown that he has already made an illegal se of them or intends so to use them? So, also, as to a slot ıachine, conceded in this case to be incapable of being used or legal purposes, it is a most effective manner of preventing :s use to seize it as "outlawed" property. The duty to pre- ent crime carries with it in such a case the power to sum- ıarily seize the offending article. It would be anomalous to old that the legislature, in imposing on the policeman an bligation to prevent crime, intended to deny him one of the ıost effective means of performing such obligation. The ower of the legislature to confer this authority under the olice power cannot be questioned. If it can properly confer pon a milk inspector power to destroy milk summarily, as in)eem's Case, supra, it may for the same reason authorize the ummary seizure and destruction of the tools and implements f crime. We have been cited to no case where these prin- iples have been denied. Those relied upon by the appellee, ome of which have already been adverted to, are not in con- ict with them. Those are cases where the articles seized ıay be put to legal as well as illegal uses, and, until it has been hown before the proper tribunal that it was designed to be ut or has been put to an illegal use, it cannot be seized as a reventive measure. But that is not the case at bar, because 'e here have it admitted not only that the slot machine can- ot be used for a legal purpose, but that the appellee intended) use it for illegal purposes. The subject has been learnedly nd exhaustively discussed by Judge Redfield in the case of

Spalding v. Preston, 21 Vt. 10, in which the court sustained the view we have presented. That was an action of trover for certain counterfeit coin taken from a person who was afterwards indicted. The coin was claimed by a third person without, however, accounting "for the unfortunate guise" in which it was presented. Redfield, J., delivering the opinion of the court, said, "If trover, under these circumstances, can be maintained, then trespass would also lie for the taking of the property." Further, that the right of the sheriff to seize rests "upon grounds of preventive justice, aside of any statute whatever upon the subject: and that the right to detain the base metal might be rested on two grounds: (1) For evidence, and (2) because courts of justice will not sustain actions in regard to contracts or property which have for their object the violation of law. Such property is 'outlawed.'" And again, in State v. O'Neill, 58 Vt. 163, 2 Atl. 586, where the court said "that articles or instrumentalities once impressed with the characteristics of adaptation and intended use for purposes prohibited by law, and contrary to public peace, health, or morals, are subject to summary seizure under statutory, or even general, police regulations." In Bales v. State, 3 W. Va. 687, the court, while holding that poker chips might be the subject of larceny, said: That "they could not have been recovered by action is clear on the general principle that no court would lend its aid to the guilty keeper or owner to recover his illegal articles." This case is not cited as being approved in all respects by this court, but merely as sustaining the position that in a case like the present one the action of replevin will not lie. Eichenlaub v. City of St. Joseph (Mo.) 21 S. W. 8. For these reasons the judgment must be reversed. Judgment reversed, and cause remanded for new trial.

Replevin to Recover Property Seized in Exercise of Police Power.

BELL
v.
INCORPORATED TOWN OF CLARION.
(*Supreme Court of Iowa, Jan. 24, 1901.*)
[84 N. W. Rep. 962.]

Burden of Proving Contributory Negligence.*—An instruction that the law presumes, until the contrary is shown, that a person injured, prompted by a natural instinct to avoid danger, exercised care, which presumption will prevail unless overcome by evidence that he was negligent, is erroneous, as throwing the burden on defendant to show contributory negligence.

Injury While Crossing Street at Other Than Regular Crossing—Not Negligence Per Se.—Crossing a street in a diagonal direction, at a

*See Conrad *v.* Town of Ellington (Wis.), 2 Mun. Corp. Cas. 694.

Bell *v.* Incorporated Town of Clarion

place other than the regular crossing, and stepping on a sidewalk at a place not at a crossing, is not, *per se*, negligence defeating a recovery for injury resulting from a defect in the sidewalk at that place.

Appeal from district court, Wright county; D. R. Hindman, Judge.

This action was commenced by Eliza Bell, now deceased, and the present plaintiff, her husband, has been substituted in her stead. It is for personal injuries sustained by the original plaintiff, and the claim in her behalf is that such injuries were received by reason of a defective sidewalk. Her subsequent death is claimed to have been the result of the injuries so received. There was a verdict for plaintiff, and from the judgment thereon the defendant appeals. Reversed.

Nagle & Nagle, for appellant.

W. D. Evans and Peterson & Humphrey, for appellee.

McClain, J. The walk in question was constructed of three stringers, across which inch boards were nailed; the ends projecting beyond the outside stringers. Deceased had crossed the street at a point other than the street crossing, and in her attempt to get upon the walk she seems to have stepped on the end of one of the boards, which flew up and struck her in the face, inflicting the injuries complained of. The husband of deceased was with her at the time, but was walking ahead of her, and did not see the accident; but, on hearing the rattle of the board and an exclamation from his wife, he looked back, and saw her with her hand to her face; the board lying in front of her, wrong side up, and her face bleeding. No other witness was present at the time of the accident. The court instructed the jury with reference to the necessity of proving want of contributory negligence on the part of the deceased in connection with the accident, and, although these instructions are complained of, we do not find in them any material error. But the court said further to the jury: "(2) You are instructed that it is a recognized rule of human conduct that persons in their sober senses naturally and instinctively seek to avoid danger. The law, therefore, presumes, until the contrary appears, that the deceased, prompted by this natural instinct, did exercise care in approaching and stepping upon the sidewalk in question, where the injury occurred. But such presumption would be overcome by evidence that satisfied the minds of the jury that she was negligent." The rule that an ordinary person, prompted by natural instincts, will use reasonable care to avoid injury, has long been recognized in this state, in connection with the rule that in an action for personal injuries plaintiff must show the exercise of reasonable care on his part, or, as it is usually expressed, the absence of contributory negligence. In

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Burden of Proving Contributory Negligence.

Greenleaf v. Railroad Co., 29 Iowa, 14, it is said that it is "incumbent on plaintiff to show by direct testimony, or by presumptions arising from facts and circumstances, that the deceased was not negligent in connection with the injury," and that it is always competent for the jury "to give due weight to those instincts which naturally lead men to avoid injury and preserve their lives," and therefore that "these instincts, motives, and feelings may properly constitute evidence for the consideration of the jury." In Way v. Railroad Co., 40 Iowa, 341, the jury were instructed that "plaintiff is not required to produce direct and positive testimony showing just what the deceased was doing at the instant that he received the injury causing his death, that the law requires only the highest proof of which the particular case is susceptible, and that the jury might take into consideration, in weighing the evidence, the hazardous nature of the work in which brakemen are employed, and give due weight to the instincts and presumptions which naturally lead men to avoid injury and preserve their own lives." And the court, approving this statement of the law, says: "It is objected that this shifts upon defendant the burden of proving the contributory negligence of the deceased. We do not think the instruction vulnerable to this objection. The instincts prompting to the preservation of life are thrown into the scale as evidence, like the presumptions of sanity and innocence. But when the whole evidence is considered, these instincts included, the plaintiff cannot recover unless the preponderance of the evidence is in his favor." In Dunlavy v. Railroad Co., 66 Iowa, 435, 23 N. W. 911, there was an instruction that "the jury may take into consideration, in weighing the evidence, the hazardous nature of the work in which the brakeman was employed, and give due weight to the instincts and presumptions which naturally lead men to avoid injury and preserve their own lives." This instruction was held to be erroneous, the court saying: "The instinct of self-preservation, planted in all persons, may, in a proper case, be allowed some weight as raising an inference of care. Way v. Railway Co., 40 Iowa, 345. But, where the party who has the burden of proving care can show by direct evidence what care was exercised, he should, we think, show it by such evidence; and if the direct evidence shows care, or a want of it, there is no room for a mere inference. The plaintiff was able to show by direct evidence what care he exercised. The case is different from Way v. Railway Co., above cited." In Whitsett v. Railroad Co., 67 Iowa, 150, 25 N. W. 104, the court approves the last case, and distinguishes it from the Way Case by pointing out that in the latter death had resulted from the injury, and it was material to determine just what deceased was doing at the instant of injury, and that there was no direct testimony from which that fact could be determined. The court says: "But, when the facts of the transaction are proven by direct testi-

mony, the question whether the party acted negligently or with care is to be determined from those facts. Plaintiff testified that he, in the nighttime, and when the train was in motion, jumped or stepped from the top of the box car into a narrow space between the end of the tool chest and the side of the tender, and the question was whether this was a negligent or careful act. It is manifest that the consideration that men do not ordinarily expose themselves to dangers or death can have no weight in determining that question." In Reynolds v. City of Keokuk, 72 Iowa, 371, 34 N. W. 167, the jury were instructed that "the natural instinct which leads all rational persons to avoid injury to their persons as far as possible is an element of evidence proper for the consideration of the jury, with all the outstanding circumstances introduced as evidence on the question whether the plaintiff was or was not, at the time of her injury, exercising ordinary care and prudence." And the court holds this instruction to have been erroneous in that case, as it appeared that the injured person was a witness in her own behalf, saying that "where the person injured is living, and does or can testify to the facts and circumstances, and in what manner the injury was received, then there is no reason why the inference arising from the instinct of self-preservation should be indulged." In Hopkinson v. Knapp & Spaulding Co., 92 Iowa, 328, 60 N. W. 653, the court says that "direct and positive evidence that the injured person, who is deceased, did not by his own negligence contribute to the injury, is not required," and "where such evidence cannot be obtained it is proper for the jury to consider the instincts of men, which naturally lead them to avoid danger, as evidence of due care on the part of the person injured." In Baker v. Railroad Co., 95 Iowa, 163, 63 N. W. 667, the court holds that the inference which might otherwise have been drawn from the instinct of self-preservation was overcome by the evidence indicating that if deceased had been exercising due care he would not have been injured; the accident having resulted from deceased being struck by a train while he was walking along the track. In Spaulding v. Railroad Co., 98 Iowa, 205, 67 N. W. 227, it is held that the jury might, in an action for injuries causing death, for the purpose of determining whether deceased was negligent, "give due weight to the instincts and presumptions which naturally lead men to avoid injury and preserve their own lives," and that "it is sufficient, if it be the reasonable inference from the facts proven, that the decedent at the time of the accident was in the line of his duty, and exercising proper care." In Salyers v. Monroe, 104 Iowa, 74, 73 N. W. 606, which was an action to recover for injuries received by plaintiff, the jury were instructed to consider the natural instinct of man to guard himself against danger and preserve himself from injury, in determining whether plaintiff was guilty of contributory neg-

ligence. And the court says: "It is settled that such an instruction may be given where the care exercised by a person at the time of an accident which caused his death is in question, and direct evidence as to such care used cannot be had. But when there is such evidence the instinct of self-preservation cannot be given any weight."

These extracts from the leading cases in this state in which this question has been considered are sufficient to indicate that it has been fully settled that, in the absence of any direct evidence whatever, the instinct of self-preservation may be considered, and will constitute a sufficient basis for the inference of want of contributory negligence, but that, where there is direct evidence as to whether or not the injured party was negligent, then the inference is entitled to but little, if any, weight. We suppose that the idea involved in the latter proposition is that the direct evidence as to what took place is of higher character than the mere inference to be drawn from the instinct of self-preservation; and, surely it must be conceded that in such a case the inference is entitled to but small consideration, if any. But the instruction given by the court in the case we are now considering was to the effect that in view of the instinct of self-preservation a presumption arises that the injured person was careful, which presumption will prevail unless overcome by evidence satisfying the jury that the injured person was negligent. This statement of the law, if it were correct, would entirely revolutionize the doctrine, well established in this state, that the plaintiff has the burden of proving freedom from contributory negligence. If a presumption of due care is to be entertained, then the burden of proof would in practically every case be upon the defendant to show that the plaintiff was negligent. The mere statement of this proposition is sufficient to show that it is erroneous. The court was, no doubt, misled by the ambiguous use of the term "presumption" which is found in some of the cases. Frequently that word is used as indicating merely an inference which may be drawn from certain facts, and where it has been used in the previous decisions of this court in this connection it must be so interpreted. See, for instance, the language of the Baker Case, above, where previous cases are cited as holding that from the conduct of the injured person, who was engaged in the line of his employment, "aided by a presumption that arises from a natural disposition to avoid injury, the fact of diligence could well be found." But in that case it was held that the evidence of the circumstances overcame the inference based on the instinct of self-preservation. So, in the case of Dalton v. Railway Co., 104 Iowa, 26, 73 N. W. 349, which was an action for injuries resulting in the death of the person injured, who was struck by a train while crossing defendant's track, it was said that: "It is a recognized rule of human conduct that persons in their sober senses naturally and instinctively seek to avoid

danger. Therefore it must be presumed, until the contrary appears, that the deceased, prompted by this natural instinct, did exercise care in approaching and going upon the crossing,"—and that "whether the circumstances are such as to overcome the presumption that deceased, prompted by the instinct of self-preservation, did exercise the care required of him, was a question for the jury." It is evident that what is meant here is simply that the inference to be drawn from the instinct of self-preservation was entitled to some weight in connection with the inference to be drawn from the circumstances under which the accident occurred, and that the weight of the whole evidence was a matter for the jury. So, in Crawford v. Railway Co. (Iowa) 80 N. W. 519, it is remarked that, as the person injured lost his life in the collision complained of, the presumption that he exercised due care must prevail; and it is said, "That such a presumption is proper and must be given weight may be conceded, but it cannot prevail against evidence which shows that he could not have exercised due care." The use of the word "presumption" as a substitute for "inference" is also illustrated by the cases of Cameron v. Railway Co. (N. D.) 77 N. W. 1016, and Adams v. Iron Cliffs Co. (Mich.) 44 N. W. 270, upon which appellee relies. In the present case the inference to be drawn from the instinct of self-preservation could properly be considered by the jury, and we would not, therefore, be justified in sustaining the contention of defendant that there was no evidence of want of contributory negligence on the part of deceased. Burns v. Railroad Co., 69 Iowa, 450, 30 N. W. 25. But that is a very different thing from saying to the jury that the presumption arises therefrom, requiring evidence to the satisfaction of the jury to overcome it.

Appellant contends that the act of the deceased in not following the regular street crossing and sidewalk, but, instead, crossing the street in a diagonal direction, and stepping upon the sidewalk at the place of injury, which was not at a street crossing, was in itself such negligence as to defeat plaintiff's recovery: but we do not concur in this view. Certainly it is not negligence in itself to pass from the sidewalk to the street, or from the street to the sidewalk, at a place other than that where there is a street crossing. Whether such act is negligence in a particular case must depend upon the circumstances, and must be a question for the jury.

Injury While Crossing Street at Other Than Regular Crossing —Not Negligence Per Se.

Without discussing the evidence with a view to determining whether there is any evidence on which a verdict for plaintiff can properly be sustained, which would be improper, in view of a new trial, the case is, for the error above pointed out, reversed.

GLEASON

v.

BARNETT *et al.*

CITY OF LOUISVILLE *v.* GLEASON *et al.*

(Court of Appeals of Kentucky, March 5, 1901.)

[61 S. W. Rep. 20.]

Street Assessments—Petition of Property Owners—Signing by Agent.—Under the charter of the city of Louisville, providing that "the general council may in its discretion upon a petition of a majority of the property owners on the part of a public way proposed to be improved grant them permission to improve said public way under the supervision of the engineer," a petition signed by an agent for property owners, which was granted by the council, was sufficient to protect the property owners in the construction made thereunder, so as to exempt them from further taxation for that purpose.

Same—Resolution Where Ordinance Required.*—Though the charter required an ordinance for the construction of the street, yet as the council, by resolution, accepted the proposition of the lot owners, and permitted them to incur the expense of the work under the belief that they would be free from further taxation for the purpose, the city cannot now charge the property owners with any part of the cost of reconstructing the street, upon the idea that the construction is an original one.

Same—Same.—The resolution, if it had been passed with the formality required in the enactment of an ordinance, would have been binding as an ordinance.

Appeals from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by J. R. Gleason against Andrew Barnett and others to enforce a lien for the cost of a street improvement. Judgment for plaintiff against the city of Louisville, and plaintiff and the city of Louisville separately appeal. Affirmed.

Lane & Harrison, for appellant Gleason.

H. L. Stone, for appellant city of Louisville.

T. L. Burnett, John Roberts, and Hardin H. Herr, for appellee Barnett.

O'Rear, J. Appellant J. R. Gleason, as contractor, under a contract made with the city of Louisville for the construc-

*See notes at end of case.

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tion of a section of Highland avenue between Broadway and Everett, brought this suit against appellees, Andrew Barnett and others, upon the apportionment warrants issued against the respective abutting lot owners for the work done. The city of Louisville was also made a party defendant. The petition alleged that the work named was the original construction of the section of the street named, and was in accordance with an ordinance duly passed by each board of the general council of the city upon the recommendation of the board of public works, and duly published as required by law, and that appellant Gleason was awarded the contract as the result of competitive bidding required by law; all the facts relating to the passage of the ordinance and letting of the bid being set forth in detail and at length. A demurrer was sustained to this petition, and on appeal the judgment was reversed March 11, 1899 (50 S. W. 67); we having held in the opinion then delivered that the petition did state a cause of action against the defendants. An answer was filed, setting up various matters of defense; but they may be summarized in the statement that defendants alleged that in 1888 the street had been graded and macadamized, under the provisions of the city charter, at the cost of the abutting lot owners, and that the construction now being sued for was not original, but was a reconstruction of said work. It appears that in 1888 the locality in question was but sparsely settled, and at the instance of certain citizens residing on Everett avenue the question of macadamizing Highland avenue was agitated; Highland avenue then being a dirt road, in some parts of the winter being almost impassable by reason of mud. The charter of the city concerning original improvement or construction of streets at the expense of the abutting lot owners was substantially as now, however, expressly providing: "(1) Public ways, as used in this act, shall mean all public streets, alleys, sidewalks, roads, lanes, avenues, highways and thoroughfares, and shall be under the exclusive management and control of said city, with power to improve them by original construction and re-construction thereof, as may be prescribed by ordinance; improvements, as applied to public highways, shall mean all work and materials used upon them in the construction and re-construction thereof, and shall be made and done as may be prescribed either by ordinance or contract approved by the general council. (2) The general council may in its discretion upon a petition of a majority of the property owners on the part of a public way proposed to be improved grant them permission to improve said public way under the supervision of the engineer, and within such time as may be fixed by the general council."

It is claimed for appellees Barnett and others that, under the last clause of the above statute, the citizens in interest petitioned the general council in 1888 to allow them to con-

struct the improvement on this section of Highland avenue at their own expense, and that they did so.

Following is the resolution of the council and the petition under which the construction of 1888 was done:

"Be it resolved by the general council of the city of Louisville: That property owners, and others interested therein, be and they are hereby authorized, at their own expense and free of cost to the city of Louisville, to cause the improvement of Highland avenue from the north line of New Broadway northeastward to the line of Everett avenue, in accordance with the specifications hereto attached and made part hereof, to be done and completed as herein provided, subject to the appproval of the city engineer, such permission being granted because the street is not in condition for a more perfect and complete construction at the present time."

"To the Honorable Mayor and General Council: We, the undersigned citizens and property holders of the city of Louisville, owning property on the street mentioned, respectfully ask that the above resolution be passed. Pink Varble, Jr., for the Property Owners."

Then follow the specifications, as part of the above resolution.

The work is shown to have been done according to these specifications, under the direction and approval of the city engineer, and accepted by him, and paid for by the property owners. Under this contract of 1888 the surface of the street was required to be, and was, excavated along Highland avenue for a width of 16 feet, one-half on each side of its center, graded level and smooth, and covered with large broken stones or spalls from the quarries, so as to leave the crown 3 inches higher than outer edges, all smoothly and evenly spread throughout the length and width of the grade, and covered with gravel or fine spalls, so as to bring the surface of the street to the level of the sewer caps. It seems that this street at the point in question is 30 feet wide, from curb to curb, and that no curbing or guttering had been provided by the original improvements, as well as that the difference between the 16 feet of macadam and the 30 feet was left unconstructed. The lower court dismissed the petition as against the lot owners, holding the work done under the ordinance of 1894 to have been a reconstruction, and not original construction, and adjudged the cost thereof to be paid by the city of Louisville. The city prosecutes this appeal, urging that the work was at least partial, if not wholly, original construction, and that the cost of it, in so far as it was original construction, should be borne by the lot owners. The contractor appeals, without complaint of the judgment, but that, in event of a reversal for the city, his rights might be protected by a reversal, consequently, of the judgment against him in favor of the lot owners.

The sole question for determination is, was the construction under the ordinance of 1894 original construction, or a reconstruction of the street? For, if it was the former, the lot owners were unquestionably liable; if the latter, the city only is liable. In solving this question, incidentally there are presented the following for adjudication: (1) Was the petition signed by Varble a sufficient authorization to protect the lot owners in the construction they made? (2) Was the granting of authority to the lot owners by the resolution of 1888 a sufficient compliance with the law requiring an "ordinance" to justify the construction?

Street Assessments—Petition of Property Owners—Signing by Agent.

It will be observed, there is nothing in the statute requiring the petition to the general council by the property holders to be in writing or to be signed by them. A personal petition, made by the citizens going in a body to the council chamber, would undoubtedly have been sufficient. Obviously, the purpose of the petition was to apprise the council of the desire or willingness of the property owners to be affected by the improvement, and of the fact of such willingness and readiness on their part to undertake the construction at their own expense. Even had a petition, in writing, signed by a certain number of citizens, been presented, extraneous inquiry would have been necessary, in order to establish to the satisfaction of the council (1) whether the signers were bona fide residents of the district affected; and (2) whether they constituted a majority. So here the council must satisfy itself that Mr. Varble was authorized by the citizens affected to represent them in the matter, as well as that those so represented constituted a majority of those involved in the proceeding. We perceive no satisfactory reason why the petition might not be presented by an authorized agent, whose signature alone would satisfy the statute, provided he had the authority to represent the principals in the act. Harvey v. Lloyd, 3 Pa. St. 331; Skinner v. Avenue Co., 57 Ill. 151.

Same—Resolution Where Ordinance Required.

More difficulty is presented by the question whether the granting of authority for the improvement should not have been by ordinance instead of resolution. At first glance this difficulty may not be so apparent, but when it is considered that a resolution may be adopted by both bodies of the general council of Louisville at the same session, while an ordinance requires at least two weeks to intervene between its passage in one body and in the other, thus affording to the neighborhood affected an opportunity to protest and otherwise be heard as to their desires or objections, it will readily be understood that a valuable purpose was in view, in requiring such proceedings to be by ordinance. But here the city has by its action allowed the citizens owning the lots in question to proceed in the expense involved in the original construction of the macadam street,

Notes

under the supervision and approval of its engineer, and upon plans and specifications furnished by him, and ought not to be allowed to repudiate its action in the premises. Of course, if the resolutions had been passed in the manner and with the statutory formality required in the enactment of an ordinance, the mere fact that it was called a "resolution," and did not follow in strict semblance the usual form of an ordinance, would raise no question of its binding effect as an ordinance. Bouv. Law Dict. tit. "Ordinance"; Sower v. City of Philadelphia, 35 Pa. St. 231; San Francisco Gas Co. v. City of San Francisco, 6 Cal. 190. In Mackin v. Wilson (Ky.) 45 S. W. 663, a turnpike road had been taken into the city limits, and afterwards the adjacent property owners had, at their own expense, constructed sidewalks and dedicated them to the public, with the consent, or at least without the objection, of the city. We held such construction of the sidewalks to be an original construction, so as to deprive the city of the right to compel the construction of new or more substantial walks at the expense of the lot owners. This case presents a much stronger equity for the lot owners than that one. For here the city, by resolution, adopted the proposition of the lot owners to construct a macadam street according to specifications prepared by it, the work to be done under the supervision of its engineer, and permits the property owners to incur the expense incident to the work, under the evident belief that when they had discharged this obligation their property would be free from further taxation for the same purpose. It is clear that the city should be bound by this proceeding, and, so far as the carriage way of this portion of Highland avenue is concerned, must be held to have exhausted its right to compel its construction at the expense of the abutting property owners. Such having been the ruling of the learned judge below, the judgment is affirmed in each appeal.

Same—Same.

NOTES.

RESOLUTIONS AND ORDINANCES.

Distinction between Ordinances and Resolutions.—The courts very generally recognize a distinction between ordinances and resolutions, the ordinance being considered as the more formal and permanent action of the council, while the resolution is of a temporary and informal character. Blanchard *v.* Bissell, 11 Ohio St. 96; City of Central *v.* Sears, 2 Cal. 558; State *v.* Bayonne, 35 N. J. L. 335; Kempner *v.* Com., 40 Pa. St. 124.

Same—When Action May Be Validly Taken by Either Ordinances or Resolutions.—But though this distinction is generally recognized, it is also established by an overwhelming weight of authority that where authority is given the council to act in a certain matter without any designation of the form or manner of the action, a resolution is of equal efficacy with an ordinance. Creebs *v.* City of Lebanon, 98 Fed. Rep.

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549; Illinois Trust & Saving Bank *v.* City of Arkansas, 22 C. C. A. 171' 76 Fed. Rep. 272, 34 L. R. A. 518, with collection of cases in the opinion of the court; Babcock *v.* Scranton Trac. Co. (Com. Pl.), 1 Lack. Leg. N. 223; Brady *v.* City of Bayonne (N. J. Sup.), 30 Atl. Rep. 968; Stali *v.* Newark, 23 Atl. Rep. 949; McGavock *v.* City of Omaha, 58 N. W. 543; Indianapolis *v.* Imberry, 17 Ind. 175; Delphi *v.* Evans, 36 Ind. 90; Terre Haute *v.* Turner, 36 Ind. 522; Mowberry *v.* Jeffersonville, 38 Ind. 198; City of Crawfordsville *v.* Braden, 28 N. E. 849; Arkadelphia Lumber Co. *v.* City of Arkadelphia, 19 S. W. Rep. 1053; State *v.* Jersey City, 3 Dutch. (N. J.) 493; Merchant Wire Co. *v.* Chicago, B. & I. Ry. Co., 70 Iowa 105; Butler *v.* Passaic, 44 N. J. L. 171; Sowers *v.* Philadelphia, 35 Pa. St. 231; Gas Co. *v.* San Francisco, 6 Cal. 190; Municipality *v.* Culling, 4 La. Ann. 335; Green Bay *v.* Brauns, 50 Wis. 204; Kempner *v.* Com., 40 Pa. St. 124; Smalley *v.* Yates, 36 Kan. 519; Atchison *v.* DeKay, 148 U. S. 591; Courter *v.* Newark, 54 N. J. L. 329; State *v.* Jersey City, 27 N. J. L. 493; State *v.* Passaic, 44 N. J. L. 171; State *v.* Henderson, 38 Ohio St. 644.

Thus, in Babcock *v.* Scranton Traction Co. (Com. Pl.), 1 Lack. Leg. N. 223, it was held that in the absence of a law prescribing the mode, the consent of a city permitting a street-railway company to lay its tracks in certain streets could be evidenced by joint resolutions as well as by an ordinance. Again, in Atchison *v.* DeKay, 13 S. Ct. 706, 148 U. S. 591, a resolution by which the council gave its consent to a bond issue was held to be of equal efficacy with an ordinance and it was held in Pollock *v.* San Diego, 50 Pac. 769, that no mode for the council's action being prescribed, the authority to employ counsel, conferred upon the common council may in the absence of a specification of the mode be exercised validly by joint resolutions of the two boards of the council as well as by ordinance.

In Kline *v.* Streets, 78 Ill. App. 42, it was held that a resolution, adopted by the same vote as required for an ordinance, is as valid an exercise of a city's authority to build a bridge and borrow money as if the action were by ordinance.

Same—Statutory and Charter Regulations.—But where the constitutional provision, statute, or charter which confers authority upon the council to act in any matter directs that the council proceed by ordinance, it is usually held that a resolution is not sufficient. Newman *v.* Emporia, 32 Kan. 456; Central *v.* Sears, 2 Cal. 588; State *v.* Bergen, 33 N. J. L. 39; Cross *v.* Morristown, 3 C. E. Green 305; Blanchard *v.* Bissell, 11 Ohio St. 96; Woln *v.* Philadelphia, 99 Pa. St. 330.

Illinois.—In People *v.* Mount, 186 Ill. 560, 58 N. E. 360, it is held that an ordinance cannot be modified or repealed by a resolution. The court said: "The wise and salutary provision of the statute which clothes the mayor with the veto power may be defeated by a city council by the simple election on its part to change the form of its legislative acts into resolutions, instead of embodying them in ordinances, if it be true that municipal legislation can be accomplished by mere resolutions. The case at bar furnishes an instance of the danger of allowing important municipal legislation to take the form of a resolution, in that it destroys the supervisory power of the mayor of the city. It is well said by the appellate court in their opinion delivered upon the decision of this case:

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'While, therefore, it requires eight votes to pass an ordinance of the city, and ten votes to pass it over a veto, a majority of a quorum or five members of the council can pass a resolution, and the mayor cannot interfere with it.' It is therefore a fair matter of inference that the legislature intended the power to license, and fix the amount of license fees, to be exercised by the passage of ordinances, because otherwise the supervisory power of the mayor would be interfered with."

Iowa.—Under Iowa Code, sec. 641, conferring authority upon a city council to create a new ward, the council must act by ordinance and a resolution is not sufficient. Cascaden *v.* Waterloo, 100 Iowa 673, 77 N. W. 332.

Kansas.—City councils must order and direct the making of street improvements by ordinance and not by resolution merely. Proceedings taken and assessments laid in pursuance of such resolution are void and cannot be ratified and confirmed by a subsequent ordinance regularly passed for the purpose. Newman *v.* City of Emporia, 32 Kan. 456, 7 Am. & Eng. Corp. Cas. 261.

Missouri.—In Hisey *v.* City of Charleston, 62 Mo. App. 381, it was decided that under a statute placing the legislative power of a city in the council and mayor providing also for action by ordinance, an ordinance prescribing the compensation of the city officers cannot be changed by a resolution adopted by the council alone. See, in accord, City of Westport *v.* Mastin, 62 Mo. App. 647.

When the mayor and city council are given power by the charter to regulate the erection of wooden buildings within such limits as may be prescribed by ordinance, a resolution of the council not presented to the mayor does not grant a valid permit to erect a wooden building within the limits prescribed by ordinance, it being held that not only the limits but the wooden buildings to be erected therein must be regulated by ordinance. Eichenland *v.* City of St. Joseph (Mo. Sup.), 21 S. W. 8.

In City of Cape Girordeau *v.* Fougen, 30 Mo. App. 551, it is held that where there is no affirmative evidence that a resolution was passed with the same formalities as an ordinance, such resolution does not have the effect of an ordinance where the charter of the city prescribes an ordinance as the mode in which the council is to act.

But a so-called resolution which shows on its face that it is the joint act of the city council and mayor and which was published as ordinances are required to be published, was held to be a valid exercise of authority under a statute empowering the city to provide by ordinance for public improvements. Springfield *v.* Knott, 49 Mo. App. 612.

New Jersey.—In Shimer *v.* Town of Phillipsburg (N. J. Sup.), 33 Atl. 852, it was held that authority to lease land belonging to the town of Phillipsburg could not be given by resolution but only by ordinance as directed by the charter. See, for similar case, State *v.* Jersey City, 34 N. J. Law 390.

In West Jersey Traction Co. *v.* Shivers (N. J. Sup.), 33 Atl. 55, it was held that under the charter and act creating the board of public works of the city of Camden the consent of the board to the laying of its tracks by a street-railway company in the city streets is a street regulation which can only be given by ordinance. See also, State *v.* City of New-

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ark (N. J. Sup.), 23 Atl. 284; Hunt *v.* Lambertville, 45 N. J. L. (16 Vroom) 279.

The power conferred on boroughs by the borough government act (Supp. Revision, p. 44) to prevent and remove obstructions from public highways can only be exercised by an ordinance of the borough council. The power conferred on boroughs by the supplement to said act of March 13, 1883 (Supp. Revision, p. 49), and the further supplement of March 11, 1885 (Supp. Revision, p. 50), to work, repair, and improve public highways out of the road tax, may be exercised by a mere resolution of the council. A resolution directing the removal of obstructions from a public avenue, and the working of the avenue for travel, cannot be sustained; for the first direction is unauthorized, because not by ordinance, and the second direction is so essentially connected with the first that both must fall. See also, State *v.* City of Bayonne (N. J. Sup.), 24 Atl. 448.

In State *v.* City of Patterson, 46 N. J. L. 62, 5 Am. & Eng. Corp. Cas. 430, the court said: "It is well settled that when the law requires a proceeding to be instituted by an ordinance it cannot be effected by resolution merely. The latter, wanting the solemnities of the former, is not regarded as a legal equivalent." In this case the facts were that the charter of the city of Patterson provides that any legislative act of the board of aldermen shall be by ordinance passed by a vote of a majority of its members, and in case an ordinance involves the expenditure of money, the votes of two-thirds of the members of the board shall be necessary to its passage. The board of aldermen, by resolution, directed the construction of certain sewers and drains, and passed an ordinance for the issue of bonds to pay for the same; the mayor of the city declined to sign the bonds thus ordered to be issued. *Held*, that the act of the board of aldermen was legislative in its character, and could not be effected by resolution.

Ohio.—Though by statute the city of Columbus can appropriate money only by ordinance, it is held in Tyler *v.* City of Columbus, 6 Ohio Cir. Ct. R. 224, that a resolution by the city council, authorizing the mayor and auditor to borrow money for the purpose of opening and extending streets is not an appropriation of money within the meaning of the statute.

Texas.—Where the charter prescribes a certain style for ordinances to be drawn in and a resolution is not drawn in that style it cannot take effect as an ordinance, and where under the charter an office can be created only by ordinance it cannot be abolished by a resolution of the city council which is not in effect an ordinance. San Antonio *v.* Micklejohn, 89 Tex. 79, 33 S. W. 735. Where a city charter gives the council power to regulate the duties of city offices by ordinance a resolution by the council authorizing the mayor to appoint a collector of delinquent taxes is invalid. Brand *v.* San Antonio (Tex. Civ. App.), 37 S. W. 340.

MORGAN *et al.*

v.

JOHNSON, Mayor.

(*Circuit Court of Appeals, Eighth Circuit, January 28, 1901.*)

[106 Fed. Rep. 452.]

Appeal—Review—Questions Determined on Former Appeal.—The decision of the circuit court of appeals on a question distinctly presented and passed upon becomes the law of the case, and will not be reconsidered on a subsequent appeal in the same case.

Deed—Attempted Impeachment by Grantor—Equities of Parties.—Where a city has undertaken to convey property to one who had a prior equitable claim thereto, receiving the consideration demanded, and has for many years acquiesced in the ownership and possession of the grantee, the conveyance will be sustained by the courts, unless clearly illegal.

Municipal Corporations—Action of Council—Mode of Executing Power.*—Where the power to dispose of property owned by a city is vested by statute in the city council, the manner of its exercise not being prescribed, the adoption of a motion authorizing and directing the conveyance of property is as efficacious as the passage of an ordinance.

Same—Authorizing Conveyance.—The city of Denver acquired from the United States the title to certain land, a portion of which had previously been purchased from a claimant by the bishop of the Catholic Church, and devoted to cemetery purposes. The bishop presented a petition to the city council, setting out such facts, and praying that the council would cause a good deed to be made on behalf of the city conveying the property to him, "as Catholic bishop aforesaid, and to his successors in office, forever." The petition was referred to a committee, which reported in favor of granting the prayer thereof, and on motion the report of the committee was adopted by a vote of the council. The council had power, under the statutes of the state, to dispose of the property. *Held*, that its action constituted sufficient authority to support a deed executed on behalf of the city conveying the property to the petitioner in consideration of the payment to the city of the amount it had expended in acquiring the title.

Deeds—Validity—Conformity to Authority Conferred to Execute.—The petition having stated the right in which the property was claimed by petitioner, and the purpose for which the title was desired, it was not essential that the deed should declare the trust upon which it was conveyed, but the designation of the grantee by his name and official title, and a recital that the deed was made by order of the city council, and "for the purposes aforesaid," was a sufficient reference to the peti-

*See Gleason *v.* Barnett *et al.*, *ante*, p. 516, and *notes*.

tion and proceedings of the council to disclose such trust; nor was the deed invalidated because the habendum clause ran to the grantee, "his heirs and assigns," instead of to his "successors in office," nor because his ecclesiastical title was incorrectly stated.

Vendor and Purchaser—Recovery of Land by Vendor—Defective Deed. —A city which has, through its council, legally and effectually authorized a conveyance of property, has received the agreed consideration, and executed a deed by its mayor, under which the grantee has taken and held possession of the property for many years, cannot recover the property by an action in ejectment, on the ground that the mayor was not the proper person to execute the deed, and it is therefore without authority and void, since the grantee is, at least, vested with the equitable title, which a court of equity would protect, by enjoining an action at law, until the city could be required to execute an effective deed.

In Error to the Circuit Court of the United States for the District of Colorado.

This was a suit in ejectment instituted in 1892 by Platt Rogers, as mayor of the city of Denver, against Samuel B. Morgan and some 40 other persons, grantees of Morgan, for the possession of the S. ½ of the N. E. ¼ of the S. E. ¼ of section 2, township 4, range 68 W., in Arapahoe county, Colo. In the progress of the cause, Henry V. Johnson, present mayor of Denver, and defendant in error herein, was substituted for Platt Rogers, and, by stipulation, the answer of Samuel B. Morgan was made to stand as the answer of all other defendants. On the death of Samuel B. Morgan, Ellen Theresa Morgan, the present leading defendant, and the other heirs at law of Samuel B. Morgan, now plaintiffs in error, were substituted as defendants in his place and stead. The cause was first tried on demurrer to the answer, and resulted in a judgment in favor of the plaintiff for the possession of the land in controversy.

Case Stated.

A writ of error was sued out, and the cause brought to this court for review. On March 1, 1897, the judgment of the trial court was reversed, and the cause remanded for further proceedings in accordance with the opinion rendered. Morgan v. Rogers, 25 C. C. A. 97, 79 Fed. 577. After the cause was so remanded, plaintiff filed a replication to the answer, and afterwards filed an amended replication, upon which the cause went to trial. The facts appear sufficiently stated in the former opinion of this court, and the conclusion there reached was that by virtue of the acts of congress and the patent of November 15, 1873, referred to in the opinion, the city of Denver acquired an unconditional title in fee simple absolute to a tract of land, including that now in controversy; and that, notwithstanding the act of congress in question authorized the city of Denver to make an entry of the land "to be held and used as a burial place for the said city and vicinity," the patent issued granted to the city such title in

fee simple, without condition, as enabled the city to sell and dispose of the land unconditionally, for any purpose deemed by it desirable. The defendants below claimed in their answer that, the city of Denver, having such unconditional fee, on February 6, 1874, conveyed the land in question to Joseph P. Machebeuf, and that on April 25, 1887, Machebeuf conveyed the same to Samuel B. Morgan, the defendants' grantor, and this court held in its former opinion that, if such were the facts, the title to the lands in question was well vested in Morgan. The amended replication filed by plaintiff joined issue on certain averments of the answer, relating to assessments of the land in question for city taxes, and the payment of such taxes by Morgan after he acquired title in 1887, and affirmatively pleads that the deed made by the mayor to Machebeuf, on February 6, 1874, was not made or executed pursuant to, or in conformity with, any vote of the city council of the city of Denver. The balance of the replication, when properly construed, questions the legal sufficiency of the other facts set up in the answer, but does not deny the facts as stated. At the trial below the plaintiff offered in evidence the patent of the United States to Joseph E. Bates, as mayor of Denver, of date November 15, 1873, and rested. The defendants, after an unavailing motion for an instructed verdict, offered in evidence the deed of the city of Denver, by Francis M. Case, mayor, to Joseph P. Machebeuf, of date February 6, 1874. Plaintiff objected to the introduction of this deed, and assigned the following reasons therefor: "That by reason of the act of congress of the United States of date May 21, 1872, entitled 'An act to enable the city of Denver to purchase certain lands in Colorado for cemetery purposes,' the city of Denver and its mayor were without power and authority to convey the lands which were acquired by virtue of the act;" and the further reason "that no ordinance or resolution of the city council of the city of Denver authorizing the conveyance has been shown"; and, further, that "the supposed deed does not conform to the recommendation of the committee to which the matter was sent, and whose report was adopted." For the purpose of a ruling on these objections, it was admitted by counsel that a certain report of proceedings before the city council, as set forth in the answer, and further stated in the admission, was correct. These papers will be referred to later in the opinion. The trial court disapproved of the first and second grounds of objection, but sustained the third, namely, that the deed offered did not conform to the recommendation of the committee to which the matter was sent, and whose report was adopted, and excluded the deed. Other deeds were offered in evidence by the defendants conveying Machebeuf's title to Samuel B. Morgan. Plaintiff's counsel objected to these deeds, on the sole ground that Machebeuf was not shown to have title. The trial court sustained these objections, and due exceptions were saved by the defendants

to such rulings. This statement reduces the case, in its broadest aspect, irrespective of the reasons given by the court below for its action, to the following questions: First, whether the city of Denver, in view of the supposed condition alleged to have been created by the use of the words in the act of 1872, "to be held and used as a burial place for the said city and vicinity," had power to convey the lands in question without regard to the condition; second, whether there was any resolution or other authority granted by the city council to sell the lands in question to Machebeuf; and, third, whether the deed actually made to Machebeuf conformed to the resolution or authority granted, if any, by the city council.

Willard Teller (Harper M. Orahood, on the brief), for plaintiffs in error.

Tom Herrington (J. M. Ellis, S. L. Carpenter, and Guy Le Roy Stevick, on the brief), for defendant in error.

Before Caldwell and Thayer, Circuit Judges, and Adams, District Judge.

Adams, District Judge, after stating the case as above, delivered the opinion of the court.

The decision of this court rendered on the first writ of error (Morgan v. Rogers, supra) is the law of this case. That decision was that the act of congress of May 21, 1872, did not operate to annex any condition of the grant authorized by it, and that the patent to Bates, as mayor, in trust for the city of Denver, and to his successors and assigns, forever, created only a naked, passive trust, under which the entire beneficial use, possession, and control vested at once and absolutely in the city of Denver. That decision satisfactorily and conclusively settled the question that the city of Denver had the right and power to convey the land in question to Machebeuf, and, notwithstanding the elaborate reargument of this question by counsel, no further consideration will now be given to it. Balch v. Haas, 20 C. C. A. 151, 73 Fed. 974, 36 U. S. App. 693, and cases there cited.

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The only remaining question is whether the city of Denver did convey the land to Machebeuf. That it recognized a highly meritorious and equitable claim of Machebeuf; that it received the agreed consideration from him therefor; that it undertook to execute a deed to perform its equitable, as well as legal, obligation; that it permitted the Bishop and his grantees to take possession of the land, and exercise rights of ownership and control, for a period of 18 years or more before it questioned their title,—cannot be again said or questioned. Under such circumstances, an insurmountable legal necessity must be found by this court to induce it to disturb the defendant's possession. What is claimed to be that neces-

Deed—Attempted Impeachment by Grantor—Equities of Parties.

sity? Substantially stated, it is this: that there was no resolution of the city council authorizing the conveyance to Machebeuf, and that the deed, as made, fails to conform to the resolution claimed to have been adopted.

It appears that on October 23, 1872, Joseph P. Machebeuf, who, as stated by the answer and not denied in the replication, was the bishop of the Catholic Church for the diocese of Denver, presented a petition to the mayor and common council of that city in words and figures as follows:

"To the Honorable the Mayor and Common Council of the City of Denver: Your petitioner, Joseph P. Machebeuf, Catholic bishop of Denver, respectively represents to your honorable body, on his own behalf and on that of the Catholic Church of Denver and Arapahoe county, that some time in the year 1863 he purchased, for the sum of $200, from one John I. Walley, the following described piece of land, situate in said county of Arapahoe, viz.: The N. E. ¼ of the S. E. ¼ of Sec. 2, T. 4 S., R. 68 W.; and that from the time of said purchase and since hitherto said piece of land has been used and still is used by the members of said Catholic Church of Denver and Arapahoe county as a burial place, and that a great number of their dead are therein buried. And your petitioner further represents that having been informed that the city of Denver has procured from the government of the U. S. a patent of a certain piece of land, including the piece hereinbefore described, to be used as a cemetery, he fears some measures may be taken by your honorable body to lay out and arrange the entire piece of land conveyed as aforesaid to the city of Denver, whereby the disposition and arrangement of said piece hereinbefore described might be greatly disturbed and interfered with, to the detriment of the said members of the Catholic Church in regard to the said land so used by them as a place of burial. Wherefore your petitioner humbly prays that your honorable body may instruct a good deed of conveyance to be made on the part of said city of Denver, by whomsoever is lawfully empowered, in granting and conveying the fee of said piece of land hereinbefore described, unto your petitioner as Catholic bishop aforesaid, and to his successors in office, forever, and your petitioner will ever pray, etc.

"Joseph P. Machebeuf, Bishop of Denver,
"By Edward L. Johnson, His Atty. in Fact.

"Denver, Oct. 28, 1872."

Such proceedings were afterwards had on that petition that on the 4th day of December, 1873, the committee which had been appointed for that purpose reported to the common council of the city of Denver, and to the mayor thereof, in words and figures following:

"To the Honorable Mayor and Council: Your committee find, on examination, that within parties had rights previous to the city, and would recommend that the prayer of the

petitioner be granted, and the mayor, in behalf of the citv of Denver, is authorized to make them their deed, provided they pay into the city treasury the cost of the land, and which means all actual [———] which the city of Denver has been to in obtaining government title, all of which is respectfully submitted."

Afterwards, and on the 8th day of January, 1874, the committee on public grounds and buildings for the city of Denver, to whom said petition had been referred reported in the words following:

"The committee on public grounds and buildings of the city of Denver, to whom was referred the petition of the Right Rev. Joseph P. Machebeuf, bishop of the Roman Catholic Church, submit the following report: Denver, Colorado Territory, Jan. 8th, 1874. To the Honorable Mayor and City Council of the City of Denver—Gentlemen: Your committee all report they have examined the foregoing petition, and would recommend the prayer of the petition be granted."

The journal of the city council shows that a motion was made to adopt the report of the committee, and that the motion was carried by a vote of eight in the affirmative to three in the negative; and it further appears, by the uncontradicted averments of the answer, that, in pursuance of said recommendation and vote of the city council, the mayor, on February 6, 1874, executed and delivered a deed to Joseph P. Machebeuf in words and figures as follows:

"This deed, made this 6th day of February, A. D. 1874, between the city of Denver, by Francis M. Case, its mayor, in the county of Arapahoe and territory of Colorado, of the first part, and the Rt. Rev. Joseph P. Machebeuf, bishop of Colorado, of the county of Arapahoe, territory of Colorado, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of fifty dollars to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has remised, released, sold, conveyed, and quitclaimed, and by these presents does remise, sell, convey, and quitclaim, unto the said party of the second part, his heirs and assigns, forever, all the right, title, interest, claim, and demand which the said party of the first part has in and to the following described real estate situate, lying and being in the county of Arapahoe and territory of Colorado, to wit, the southwest quarter of section two, township four south, of range 68 west. This deed is made by order of the city council of the city of Denver. To have and to hold the same, together with all and singular the appurtenances and privileges thereto belonging, or in any wise appertaining, and all the estate, right, title, interest, and claim whatsoever of the said party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns, forever, for the pur-

poses aforesaid. In witness whereof the said party of the first part, by Francis M. Case, its mayor, has hereunto set hand and seal the day and year above written.

"[Signed] The City of Denver, [Seal.]
"By Francis M. Case, Mayor of Denver."

This deed was duly acknowledged on the day of its date, and afterwards, on February 7, 1874, was duly recorded in the appropriate land records for Arapahoe county.

Addressing ourselves, now, to the first of the remaining objections to the deed of Machebeuf, inquiry must be made, whether there was any ordinance or resolution of the city council authorizing the execution of the deed. The petition of the bishop was addressed to the common council of the city of Denver, the duly-constituted body through and by which the city under its organic law alone could exercise the power conferred upon it to sell and convey its real estate. Sections 4, 5, City Charter 1866. After setting forth fully his equitable claim to the lands in question, the bishop closes his petition with the prayer "that your honorable body may instruct a good deed of conveyance to be made on the part of the said city of Denver, by whomsoever is lawfully empowered, granting and conveying the fee of said piece of land hereinbefore described unto your petitioner, as Catholic bishop as aforesaid," etc. This petition was first referred to a special committee, which speedily reported that the bishop and his church had rights superior and antecedent to those of the city, and "recommended that the prayer of the petition be granted" on certain terms, which, for the present purpose, it is unnecessary to repeat. Soon thereafter, for reasons unexplained, the bishop's petition was referred to the committee of the council "on public grounds and buildings." This committee soon reported that they had examined the petition, and recommended that "the prayer of the petition be granted." The prayer of the petition, so referred to, is thus effectually incorporated in the committee's report, and this report, as submitted to the council, became, in effect, a recommendation that the council direct a good and sufficient deed to be made conveying the land referred to in the bishop's petition to him as such bishop. The record shows that there was a motion to adopt that report, and that such motion was duly carried. This, in our opinion, constitutes direct and sufficient authority emanating from the city council for the conveyance in question. The objection that this authorization was made by motion, instead of by formal resolution or ordinance, is without merit. The city council was empowered by law to act for the city in selling and conveying its property, and there was no requirement that its action should be by ordinance. This court said in Illinois Trust & Savings Bank v. City of Arkansas City, 22 C. C. A. 171, 76 Fed. 271, 34 L. R. A. 518: "It is common learning that where a statute

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Same—Authorizing Conveyance.

authorizes action by the legislative body of a city, and does not require such action to be taken by ordinance, it may be taken by a vote upon a motion or by the passage of a resolution." In support of this proposition, a large number of cases are cited. The trial court applied this view of the law, and properly overruled plaintiff's objection to the introduction of the deed for want of authorization.

The only remaining question is whether the deed actually made to Machebeuf conformed to the recommendation and report of the committee so adopted by the city council. It is argued by counsel for the city that if the deed had corresponded to the prayer of the bishop's petition, as recommended by the committee to the council, the grant would have been made to "Joseph P. Machebeuf, Catholic bishop of Denver, and to his successors in office, forever." It is further argued that the petition of the bishop as submitted to the council clearly discloses that he claimed the land for his church, and desired a conveyance to him for that church, but that contrary to the recommendation of the committee as adopted by the council, and in violation of the trust disclosed in the petition, the deed as executed actually named as grantee the "Rt. Rev. Joseph P. Machebeuf, bishop of Colorado, party of the first part," with the habendum clause thus: "To have and to hold all and singular," etc., "to the only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns, forever, for the purposes aforesaid." This objection to the deed, based on the grounds assigned, or either of them, is, in our opinion, without merit. Let it be conceded that the bishop requested a deed to him as trustee for his church, and that the city authorized the execution of a deed for that purpose. It is familiar doctrine that the trust need not necessarily be stated in the deed. A declaration of trust may be contained in a different instrument from that by which the estate is vested in the trustee. Bisp. Eq. (5th Ed.) § 65. The trust under which the bishop was to hold the land was distinctly declared in the petition signed by him, and addressed to the city council. It was referred to in the report of the committee, and in the adoption of that report by the council. It was distinctly recognized in the deed itself. The title was vested in Joseph P. Machebeuf, his heirs and assigns, "for the purposes aforesaid." A careful examination of the deed as made discloses that the words last quoted must necessarily relate to his office named in the deed as bishop of Colorado; in other words, the title as disclosed in the deed is vested in Machebeuf for the purposes of his bishopric.

Deeds—Validity—Conformity to Authority Conferred to Execute.

It is next objected that the habendum clause of the deed in question runs to the party of the second part, "his heirs and assigns, forever," instead of to him and "his successors in office, forever," as stated in the petition to the city council.

Vendor and Purchaser—Recovery of Land by Vendor—Defective Deed.

We think this objection overlooks the essential purpose to be accomplished by the deed. That was to convey an indefeasible estate in fee simple to the trustee. The apt and usual words for that purpose were employed, namely, to him, "his heirs and assigns, forever." The "heirs and assigns" here mentioned are not words of purchase, but of limitation, and any title which might thereafter be devolved upon them would be subject to the same trust as was created by the deed in the first taker.

It is next objected that the deed was made to the "Rt. Rev. Joseph P. Machebeuf, bishop of Colorado," instead of "Joseph P. Machebeuf, bishop of Denver." From what has already been said, it appears that the purpose of the grant was to convey the property in question to Machebeuf, in trust for his bishopric, as disclosed in his petition to the city council. The fact, if it be a fact, that his true title is "Catholic bishop of Denver" cannot avail to defeat the conveyance to him by his proper name, even though his office may have been inaccurately stated. The only effect of such inaccuracy would be to possibly create some uncertainty as to the beneficiaries under the trust; but this possibility is greatly minimized, if not totally extinguished, by the clear declaration of trust found in contemporaneous and antecedent documents. So far as the city of Denver is concerned, this criticism of the deed, in our opinion, may be conclusively answered by the suggestion that the language criticised is nothing but descriptio personæ, and, even if inaccurate, there is abundant left to clearly fix the identity of the intended grantee. In our opinion, there is no such discrepancy between the authority conferred and the authority executed as to impair the deed in question.

It follows from the foregoing that Joseph P. Machebeuf acquired good title to the lands in question from the city of Denver, and, as the only objection to the other deeds offered in evidence conveying the land from Machebeuf to the defendants was want of title in Machebeuf, such objections should have been overruled, and the deeds admitted.

We refrain from expressing any opinion on the question argued at the bar as to whether the deed from the city of Denver to Machebeuf was executed by the proper officer or agent of the city, because no such question was raised at the trial below. No objection was made to the introduction of the deed to Machebeuf because of any irregularity in its execution, and no assignment of error presents any such question for consideration. We have also not deemed it necessary to pass upon several assignments of error relating to the pleadings or proceedings at the trial, preferring rather to dispose of the case on its merits. It follows from the conclusions reached, and already stated, that the trial court erred in excluding the deeds offered in evidence by defendants, and for that reason the judgment must be reversed.

This cause has now been twice before this court, and we have given all phases of it our most serious attention and consideration, and the conclusions reached and settled by our deliberate judgments on the two writs of error are that the city of Denver had the power to convey the land in controversy to Machebeuf, and that it did so. The deeds offered in evidence at the last trial show that Machebeuf has conveyed the lands so acquired by him to the defendants in this case. A careful scrutiny of the record shows but one possible issue that might again be submitted to the trial court, and that is whether the city of Denver properly executed the direction of the city council to convey the land in controversy to Machebeuf; in other words, whether the proper agent or officer of the city executed the deed. The facts disclosed by the unchangeable written proof, found in the record, conclusively show that Machebeuf claimed an equitable right to the land in controversy; made his claim known to the city of Denver; secured an effectual authorization by the city council for a conveyance to him; paid an agreed consideration therefor; and received the deed, which, in terms, recites that it "is made by order of the city council of the city of Denver." If, for any reason, the culminating act of executing the deed was irregularly performed,—that is to say, if the deed should have been executed by a commissioner appointed by the city council, as claimed in argument by counsel, instead of by the mayor of the city as done,—it was such a mistake or oversight, in no manner disturbing the fixed rights of the parties, as can be readily corrected by an appropriate equitable proceeding. Inasmuch as a further trial at law of this sole remaining issue could undoubtedly be enjoined until such equitable proceedings could be had, we perceive no reason for remanding this cause for a further trial. The controversy has been pending between the parties for nine years, and during that time all the substantial and meritorious questions of difference between them have been settled. It would avail nothing to pursue the litigation further. The judgment is therefore reversed, and the cause remanded to the trial court, with directions to enter judgment in favor of the defendants.

HICKS, County Auditor, *et al.*

v.

CLEVELAND.

(*Circuit Court of Appeals, Fourth Circuit, February 7, 1901.*)

[106 Fed. Rep. 459.]

Mandamus—Collection of Judgment against Municipality—Single Writ against Separate Officers.—Where it is by statute made the duty of a county auditor to assess, and of the treasurer to collect, a tax for

the payment of a municipal debt evidenced by a judgment, a single writ of *mandamus* may issue against both officers, commanding them to perform their separate but co-operative duties in the collection and payment of such judgment.

Municipal Bonds—Repeal of Statutory Provisions for Payment—Mandamus to Enforce Judgment.—Where the legislature of a state has authorized a municipality to issue bonds, and provided in the same act for the levy of taxes to pay the principal and interest of the same, such provision becomes a part of the contract on the issuance of the bonds, which cannot be impaired by any subsequent legislation; and a federal court which has rendered a judgment against the municipality on such bonds or their coupons may compel the levy of a tax for its payment by *mandamus*, notwithstanding the attempted repeal of the provisions therefor by the legislature.

Constitutional Law—Impairing Obligation of Contracts—South Carolina Statute.—The acts of the legislature of South Carolina prohibiting the levy of any tax to pay township bonds issued in aid of a railroad except in certain cases, and repealing all acts inconsistent therewith (22 St. at Large, p. 534; 23 St. at Large, p. 78), are in violation of the constitution of the United States, as impairing the obligation of contracts, and void in so far as they affect bonds in the hands of *bona fide* holders which were issued under prior statutes providing for the levy of taxes for their payment; and they constitute no defense to a proceeding in a federal court for a writ of *mandamus* to compel the levy of a tax to pay a judgment of such court rendered on such bonds.

Municipal Bonds—Mandamus to Enforce Judgment—Levy to Pay Arrears of Interest.—Where an act authorizing the issuance of township bonds required the proper taxing officers of the county to levy and collect an annual tax to pay the interest thereon, and such officers have neglected or refused to make the levies and collections until the interest has become in arrears for several years, a court which has rendered judgment for such accumulated interest against the township may order a single levy to meet the entire judgment.

Judgment—Matters Concluded—Collateral Attack.—The validity of a judgment rendered against a municipality by a federal court for interest on bonds issued by such municipality cannot be attacked on appeal from an order subsequently made directing the issuance of a writ of *mandamus* to enforce payment of the judgment. In such proceeding the judgment is conclusive as to all matters affecting the right of the plaintiff to recover, and which were or might have been litigated in the action, including the constitutionality of the act under which the bonds were issued.

Mandamus against Municipal Officers—Direction to Defendants and Their Successors.—A writ of *mandamus* directing the officers charged by statute with that duty to levy and collect a tax for the payment of a judgment against a municipality may properly be directed to such officers and their successors in office, and will bind such successors.

In Error to the Circuit Court of the United States for the District of South Carolina.

J. A. McCullough, for plaintiff in error.

Hicks, County Auditor, *v.* Cleveland

H. J. Haynsworth and John K. Shields, for defendants in error.

Before Goff and Simonton, Circuit Judges, and Waddill, District Judge.

Simonton, Circuit Judge. This case comes up on writ of error to the circuit court of the United States for the district of South Carolina. Vannoy Cleveland, the defendant in error, obtained a judgment in the circuit court of the United States for the district of South Carolina on 11th day of August, 1897, in the sum of $1,568.41 against Dunklin township, in the county of Greenville, S. C. Execution having been issued on this judgment, it was returned nulla bona. Thereupon Vannoy Cleveland filed his petition in the said circuit court, praying that a writ of mandamus do issue to W. P. Hicks, the county auditor of Greenville county, and to G. L. Walker, the treasurer of said county. The petition sets forth: That the township of Dunklin is a territorial division of the state of South Carolina, situate in Greenville county. That it is a corporation created under an act of assembly of that state to charter the Greenville & Port Royal Railroad Company, approved December 23, 1882, and an act amending the same approved December 24, 1884. This amending act changed the name of the corporation to that of the Atlantic, Greenville & Western Railway. That, being the holder of certain coupons cut from bonds of said township, issued under the provisions of said acts, he brought suit upon said coupons, aggregating $2,016, in the circuit court aforesaid. That at the August term of said court, 1897, the cause was tried, and a verdict found for petitioner in the sum of $1,512, with interest from August 11, 1897, and his costs, $56.40. That judgment was entered forthwith on said judgment for such principal sum, interest, and costs, and lodged with the marshal. That the execution has been wholly unsatisfied. The petition further alleges: That by the act of 1885, above referred to, it is, among other things, provided "that for the payment of the interest on such bonds as may be issued by said counties, cities, towns or townships, the county auditor, or other officer discharging such duties, or the city or town treasurer, as the case may be, shall be authorized and required to assess only upon the property of said city, town, county or township such per centum as may be necessary to pay said interest of said sum of money so subscribed, which shall be known and styled in the tax book as said railroad tax, which shall be collected by the treasurer under the same regulations as are provided by law for the collection of taxes in any of the counties, cities, towns or townships so subscribing, and which shall be paid over by the said treasurer to the holders of said bonds, and the said interest shall become due on presentation of the coupons." 19 St. at Large S. C. p. 240, § 9. That at the time of the rendition of said judgment, and also

Case Stated.

at this time, W. P. Hicks was, and still is, the auditor of Greenville county, and, under the terms of said act, charged with the duty of assessing upon the property in Dunklin township the percentage necessary to pay the said coupons, and that he has failed to do so, after due demand and notice, and that G. L. Walker is treasurer of the said county. That the officers of Greenville county who have been charged with the assessment and collection of the taxes for the payment of coupons upon the said township bonds have for years declined to levy and collect taxes to pay the interest upon said bonds, claiming to have acted upon a decision of the state of South Carolina. "That any further demand upon the said officers to levy and collect taxes for the payment of the interest on said bonds would, in petitioner's judgment, be useless, and that your petitioner's remedy is by mandamus alone." The prayer of the petition is that a writ of mandamus be issued, directed to the said auditor and the said treasurer, directing and commanding the said auditor to assess upon all the property in the township of Dunklin a sufficient per centum to pay the said judgment, with interest and costs, and commanding the said county treasurer to collect the said sum of money and to pay it over upon said judgment until the same shall be wholly satisfied.

Upon filing the petition a rule was issued against W. P. Hicks, county auditor of Greenville county, and G. L. Walker, treasurer of said county, to show cause on a day certain why said mandamus do not issue. Due return was made. The auditor, W. P. Hicks, made his return by way of demurrer, as follows:

"He demurs to the rule and the petition upon which the same is based, upon the following grounds: Because the action, as to him, is premature, for the reason that he has no present or existing duty to perform in the premises; it not being his duty, under the law, to collect any tax until there has been legal assessment thereof by the county auditor, which assessment has never been made. Because there is an improper joinder of causes of action herein; one action being against the county auditor to require him to make an assessment, and the other against this respondent to require him to collect the said tax, when, as a matter of law, this respondent and the said auditor have separate and distinct duties to perform."

The treasurer answered in full, setting out 22 reasons why the mandamus do not issue. The rule and returns were heard by the circuit court. The demurrer of W. P. Hicks, county auditor, was overruled, and the return of G. L. Walker was held to be insufficient. The judgment of the court concluded as follows:

"It is therefore ordered that the demurrer of G. L. Walker, treasurer for Greenville county, and the return of W. P. Hicks, auditor for Greenville county, be, and the same are hereby,

overruled and dismissed. It is further ordered that a writ of mandamus do issue out of and under the seal of this court, directed to G. L. Walker, treasurer for Greenville county, and his successors in office, and W. P. Hicks, auditor for Greenville county, and his successors in office, commanding them forthwith as follows: That the said auditor and his successors in office do assess upon all the property in the township of Dunklin a sufficient per centum to pay the said judgment set forth in the petition, with interest from the date of its rendition, and costs, and commanding the said county treasurer and his successors in office to collect the said sum of money and to pay it over upon the said judgment until the same shall be wholly satisfied, and that the said officers do discharge their said duties so commanded them at the time when they are respectively required by statute to assess and collect taxes for state and county purposes."

A writ of error was obtained, and the case is here on 28 assignments of error. The first two of these allege error in overruling the demurrer. It will be noted here that the record shows that this is the demurrer of W. P. Hicks, the county auditor. The demurrer itself shows that it is intended to be the demurrer of the county treasurer. Two errors are assigned: First, that as to the treasurer it is premature, his duties to collect the tax not arising until the auditor assesses it; and, second, because of the improper joinder of these two officers, their duties being separate and distinct.

Section 9 of the act of 1885 amending the charter of the Greenville & Port Royal Railroad Company, and providing therein for township subscriptions (19 St. at Large S. C. p. 240), makes provision for the payment of interest on the township bonds, and this duty is imposed both on the auditor and treasurer; the one assessing and the other collecting the tax. In Labette Co. Com'rs v. U. S., 112 U. S. 217, 5 Sup. Ct. 108, 28 L. Ed. 698, it is held that one writ of mandamus against all officers concerned in the separate but co-operative steps for levying and collecting a tax is the proper and effective remedy to enforce its collection. That case is on all fours with this, and meets and decides the very question raised in this demurrer.

Mandamus—Collection of Judgment against Municipality—Single Writ against Separate Officers.

Before entering upon an examination of the other assignments of error, we assume that the judgment upon which this mandamus is based is conclusive as to the validity of the bonds, and of the contract under which they were issued. Harshman v. Knox Co. Ct., 122 U. S. 316, 7 Sup. Ct. 1171, 30 L. Ed. 1152. Being coupon bonds payable to bearer, they are negotiable instruments (Gelpecke v. City of Dubuque, 1 Wall. 175, 17 L. Ed. 520); and they and their coupons are protected by all the legislation existing at their creation and their date of issue, and this protection follows them in the hands of every bona fide holder for value. The judgment is

also conclusive as to the fact that the plaintiff at law was a bona fide holder for value of the coupons sued upon. Township of Ninety-Six v. Folsom, 30 C. C. A. 657, 87 Fed. 304; Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; City of San Antonio v. Mehaffy, 96 U. S. 312, 24 L. Ed. 816.

The 4th, 5th, 8th, 12th, 16th, 18th, 19th, and 20th assignments of error proceed upon the ground that the legislature of South Carolina has forbidden its officers to levy and collect the tax to pay this, and claims of the same character,—has in fact made it a misdemeanor for them to do so,—and that mandamus, under these circumstances, will not lie.

The purpose of the general assembly in passing the act to amend the charter of the Greenville & Port Royal Railroad Company, approved December 24, 1885 (19 St. at Large S. C. p. 237), was to promote the construction of that road. To accomplish this, it authorized and encouraged townships along the proposed line of road to subscribe bonds towards this construction. In order to give character and credit to these bonds, and to induce the public to invest in them, the ninth section of the act provides a careful, full, and sure mode of providing for the interest. And an amendment to the same charter made in 1887 (19 St. at Large S. C. p. 921) provided in the same way for the payment of the principal by taxation. These provisions of the act went into, and formed a part of, the contract moving to the bondholders, who invested their money trusting to the provisions. The contract could not be impaired by any subsequent act on the part of the state of South Carolina. Port of Mobile v. Watson, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620. Counsel eloquently depict the hardship upon the property holders if the township be compelled to pay money on bonds issued for a road which has never been begun. But does that justify the hardship to innocent bondholders, who paid their money upon representations of the promoters of the road and the provisions of the act of assembly? Is it just? May we not go further, and ask, is it honest to put the loss on them because the promoters of the road were remiss, negligent, perhaps dishonest? There can be no doubt that these provisions of the statute went into, and formed a part of, the contract. The provisions of law existing at the time of issuing the bonds, providing for a tax, form a part of the contract, which cannot be impaired by any subsequent law. Butz v. City of Muscatine, 8 Wall. 575, 19 L. Ed. 490. Where at the time of issuing said bonds there existed an act authorizing an annual tax for their payment, it was beyond the power of the legislature to repeal it, so far as concerned the bonds in question, unless some other adequate remedy was substituted in its place. City of Galena v. Amy, 5 Wall. 705, 18 L. Ed. 560. See, also, Seibert v. Lewis, 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. Ed. 1161. The supreme court of the United States deals with the provisions of statutes

Municipal Bonds—Repeal of Statutory Provisions for Payment—Mandamus to Enforce Judgment.

like this as creating a trust which the state, the donor, cannot annul, and which the officers to whom the power is given are bound to execute. So neither the state nor the corporation can any more impair the obligation of the contract by repeal of the act than they can in any other way. Von Hoffman v. City of Quincy, 4 Wall. 535, 18 L. Ed. 430. In Port of Mobile v. Watson, 116 U. S. 305, 6 Sup. Ct. 398, 29 L. Ed. 620, it is said:

"When municipal corporations are empowered to take stock or otherwise aid a railroad company, and they issue bonds in payment of the stock taken, or to carry out any other authorized contract, in aid of the railroad company, they are to that extent deemed private corporations, and their obligations are secured by all the guaranties which protect the engagements of private individuals. Therefore the remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the legislature, and if they are changed a substantial equivalent must be provided. * * * When the resource for the payment of the bonds of a municipal corporation is the form of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power, and leaves no adequate means for the payment of the bonds, is forbidden by the constitution of the United States, and is null and void."

The books are full of cases to the same effect. Any further citation would be useless.

It is said that if they obey this writ the officers may be subjected to punishment, as they are expressly forbidden to levy this tax. See A. A. of S. C. (22 St. at Large, p. 534; 23 St. at Large, p. 78). The following are the provisions of these acts: "An act to forbid boards of township commissioners and county boards of commissioners and any other officer or officers to assess or levy, and county treasurers or any other officer or officers to collect any tax for the payment of township bonds, or the coupons thereof, or judgments entered up thereon, issued in the aid of a railroad not completed and finished through the township issuing such bonds and coupons, and not accepted by the railroad commissioners.

"Section 1. Be it enacted by the general assembly of the state of South Carolina, that from and after the passage of this act, no board of township commissioners nor county board of commissioners, nor any other officer or officers, shall assess or levy, and no county treasurer nor other officer or officers shall collect any tax for the payment of township bonds, or the coupons thereof, or judgments entered up thereon, issued in the aid of a railroad: provided, this act shall not apply to those bonds issued in the aid of railroads that have been completed and finished through such townships as have issued such bonds, nor until such road shall have been accepted by the railroad commissioners: provided, further, that the pro-

visions of this act shall not apply to Newberry county, or any part thereof, nor to bonds issued in aid of the Pickens Railroad Company by certain townships in Pickens county.

"Sec. 2. All acts and parts of acts in conflict with this act be, and the same are hereby, repealed."

These two acts, which contain the same provisions, in effect recognize the validity of township bonds when the railroad subscribed for has been completed and finished through the township, and when they are bonds of Newberry county and certain townships of Pickens county. They forbid the levy of the tax under other circumstances. In other words, the act is passed to obstruct the payment of the bonds issued in aid of the Greenville & Port Royal Railroad. It would seem that these acts are in conflict with section 34, art. 3, of the constitution of South Carolina now in force, which forbids special legislation. Be this as it may. The acts clearly are in conflict with the constitution of the United States, and are void. The proper course for the respondents to follow, if it be sought to punish them for obeying the order of court, if they plead it in justification and their plea be overruled, is to carry it by writ of error to the supreme court of the United States, and there obtain protection.

Constitutional Law—Impairing Obligation of Contracts—South Carolina Statute.

The assignments of error numbered 9, 10, 11, 13, 15, 21, 22, and 27 deny in various ways the authority of the auditor to make the assessment, and of the treasurer to collect the tax for this judgment. The act of 1885, under which these bonds were issued, was governed by the provisions of the constitution of 1868, then of force. Section 8, art. 9, of that constitution provided that the general assembly shall require that all the property, except that heretofore exempted, within the municipal corporation, shall be taxed for the payment of the debts contracted under authority of law. The act of 1885 (19 St. at Large S. C. p. 240), after providing for the subscription and issue of bonds by the townships, obeys this provision of the constitution:

"Sec. 9. That for the payment of the interest on such bonds as may be issued by such counties, cities, towns or townships, the county auditor or other officer discharging such duties * * * shall be authorized to assess annually upon the property of said township such per centum as may be necessary to pay said interest on said sum of money subscribed, which shall be known and styled in the tax book, as said railroad tax, which shall be collected by the treasurer under the same regulations as are provided for collection of taxes in any of the counties, cities, towns or townships so subscribing, and shall be paid over by said treasurer to the holders of said bonds as the said interest shall become due on presentation of the coupons."

This act is self-operative and requires no other legislation. Here we find the general assembly vested with full power

to tax the property of townships for the payment of debts contracted under authority of law, giving such authority and providing in detail for the levy of the tax, the collection of the money, and the payment of interest on the debt. We are not called upon to infer the power to levy the tax, as was done in U. S. v. City of New Orleans, 98 U. S. 381, 25 L. Ed. 225, and as is recognized in Floyd v. Perrin, 30 S. C. 17, 8 S. E. 14, as the necessary incident to the authority to incur a debt. The language of the statute of 1885 is plain, direct, and mandatory.

It is urged, however, that the authority of these officers is limited to making of an annual assessment and levy for the current year, that the year has long since passed, and that this judgment is for the arrears of several years. The judgment has established beyond question, at least in this court, the validity of the debt and of all steps leading to it. So the duty of the township to pay the interest annually is also established. To excuse it now because it was not paid is to make it profit by its own wrong. Maxwell v. Bodie, 56 S. C. 402, 34 S. E. 692. The language of the supreme court in City of East St. Louis v. U. S., 120 U. S. 600, 7 Sup. Ct. 739, 30 L. Ed. 798, applies here:

Municipal Bonds—Mandamus to Enforce Judgment—Levy to Pay Arrears of Interest.

"The judgment is for interest in arrear and a small amount of principal. The law required a tax to be levied annually, sufficient to pay all interest as it accrued, and the principal when due. This was neglected, and consequently there is now a large accumulation of debt, which ought to have been paid in installments. Thus far the inhabitants have been allowed to escape taxation at the time it ought to have been made, and to which they were under constitutional obligations to submit. The accumulation of the debt was caused by their own neglect as members of the political community which had incurred the obligation. Such being the case, we see no reason why it was not in the power of the court to order a single levy to meet the entire judgment, which was all for past-due obligations."

See, also, Town of Darlington v. Atlantic Trust Co., 24 C. C. A. 257, 78 Fed. 596, 42 U. S. App. 236.

The twenty-third, twenty-fourth, and twenty-fifth assignments of error assail the validity of the judgment, to enforce which the mandamus issues. It is now too late to do this. In this court and at this time that judgment is impregnable. Harshman v. Knox Co. Ct., 122 U. S. 306, 7 Sup. Ct. 1171, 30 L. Ed. 1152.

Judgment—Matters Concluded—Collateral Attack.

The seventeenth assignment of error attacks the constitutionality of the act of 1885 under which this subscription was made, because the bill originated in the senate. It is too late to inquire into this: First. Because the judgment heretofore had precludes every question that could have made in the

cause. Harshman v. Knox Co. Ct., supra. Second. Because, under the decision of the supreme court of South Carolina, it is not competent to go behind the great seal of an act ratified and approved, and attack it by the journal of either of the two houses. State v. Town Council of Chester, 39 S. C. 307, 17 S. E. 752. Third. Because the act in question is in no sense an act to raise revenue; that is, revenue for the state. It is an act to incorporate a railroad company, and incidentally to promote its construction by the issue of county, town, and township bonds.

Mandamus against Municipal Officers—Direction to Defendants and Their Successors.

The last assignment of error which remains for discussion is the twenty-seventh: Because the writ is directed to the treasurer and "his successors in office," and to the auditor and "his successors in office." "We cannot," say the supreme court in Thompson v. U. S., 103 U. S. 483, 26 L. Ed. 523, "accede to the proposition that proceedings in mandamus abate by the expiration of the term of office of the defendant, when, as in this case, there is a continuing duty irrespective of the incumbent, and the proceeding is undertaken to enforce an obligation of the corporation, a municipality to which the officer is attached. The contrary has been held by very high authority. * * * The proceedings may be commenced with one set of officers, and terminate with another; the latter being bound by the judgment."

We see no error in the judgment of the court below, and it is affirmed.

JOHNSON *et al.*

v.

CITY OF NEW ORLEANS.

(*Supreme Court of Louisiana, Feb. 18, 1901.*)

[29 So. Rep. 355.]

Illegal Action by Municipal Body—Right of Taxpayers to Implead.*—In so far as the action of a municipal body may be illegal and may result to the prejudice of the taxpayers, any one or more of the latter have the right to implead the city government.

Same—Same—Bona Fides.†—But a suit thus instituted by the taxpayers against a municipality must be a *bona fide* proceeding on their

*Upon the general right of taxpayers to implead the city government with collections of cases in specific instances, see State *v.* City of New Orleans, 1 Mun. Corp. Cas. 122, and *notes*, 142 *et seq.*; Reynolds *v.* City of Waterville, 1 Mun. Corp. Cas. 174, and *notes*, 202; Holden *v.* City of Alton, 2 Mun. Corp. Cas. 203; Mark *v.* City of Santa Rosa, 4 Mun. Corp. Cas. 472; Redersheimer *v.* Flower, 4 Mun. Corp. Cas. 502.

†See notes at end of case.

part, having the object to assert and protect their individual rights, or those common to all taxpayers.

Same — Same — Same — Interposed Persons.— Taxpayers, simply because they are such, have not the right to lend themselves, in a suit of this character, to others who have an interest to subserve, but who prefer to keep in the background. As mere interposed persons, they have no right to a standing in court.

Equity Pleading—Intervening Answer.—There is and can be no such thing as an "intervening answer" by a third person in a cause pending between others. Intervention can be only by petition and citation as prescribed by Code Prac. art. 393.

Same—Intervener—Laches.—An intervener should ask timely service of his petition and citation upon the plaintiff and defendant, and where an intervention has been filed in ample time for service on the other parties litigant, and for expiration of the legal delay for citation prior to calling the case for trial, and there has been no demand for such citation and service, and none made, the intervener has not the right, at the last moment, when the case is called for trial, to obtain time to effect such service. In such case the trial judge would rule correctly were he to hold that the intervener, in default of citation and service of his petition, has no standing in the cause, and, ignoring him, proceed to trial.

Grants of Franchises—Municipal Discretion.—Municipal discretion over the preparation of ordinances importing grants of franchises will not be interfered with when no improper exercise of municipal power or authority is shown.

Same—Public Auction—Position of Bidder.—The sale of a thing at public auction is not illegal because it happens that one purchaser, without his connivance or procurement, and without fraud, collusion, or undue influence being shown, is in a position, by reason of his situation, to bid a price higher than another.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Fred. D. King, Judge.

Action by Peter Johnson and another against the city of New Orleans. Judgment for plaintiffs, and defendant and the St. Charles Street Railway Company, intervener, appeal. Reversed.

Samuel L. Gilmore, City Atty., for appellant City of New Orleans.

Harry H. Hall, for appellant St. Charles St. Ry. Co., intervener.

Dinkelspiel & Hart, for appellees.

Blanchard, J. Plaintiff, Peter Johnson and E. J. Dare appear as citizens and taxpayers of the city of New Orleans, and complain of the official action of the common council. In so far as that action may be illegal, and may result to the prejudice of themselves in common with their fellow taxpayers, they have the right to implead the city government. Handy v. City of

Illegal Action by Municipal Body—Right of Taxpayers to Implead.

New Orleans, 39 La. Ann. 108, 1 South. 593. But a suit thus instituted by taxpayers against a municipality must be a bona fide proceeding on their part, having the object to assert and protect their individual rights, or those common to all the taxpayers, or to vindicate the charter of the corporation against ordinances, or attempts to enact ordinances, unauthorized thereby or in conflict therewith, or which may have been passed, or which the town council may seek to pass, in a manner not in compliance with the charter. Taxpayers, simply because they are such, have no right to lend themselves, in a suit of this character, to others who have an interest to subserve, but who prefer to keep in the background. As mere interposed persons, they have no right to a standing in court. "An action can only be brought by one having a real and actual interest which he pursues." Code Prac. art. 15. There is that, we think, in the record of this cause which alike justifies and calls for the foregoing observations. But the view we take of the case on its merits renders it unnecessary to pursue the inquiry further.

Same—Same—Bona Fides.

Same—Same—Same—Interposed Persons.

The petition herein sets forth, among other things, that the St. Charles Street Railway Company owns and operates, under existing franchises, which will not expire by limitation until April 11, 1906, certain street-railway lines in the city of New Orleans; that in December, 1899, the city council purported to adopt, and the mayor to approve, an ordinance whereby the comptroller of the city was authorized and directed to advertise and sell at public auction an extension for 50 years from April 11, 1906, of the said company's present street-railway rights and franchises, and also the right and franchises to construct, maintain, and operate lines of street railway on certain authorized extensions and additions to its existing lines or routes, not only during the 50 years, as above, from April 11, 1906, but also for the years subsequent to the present time and prior to April 11, 1906,—the whole to be sold in block; that the total length of the street railways included in this franchise thus advertised for sale aggregates 22.68 miles, of which the lines the said company now owns and operates constitute 11.77 miles, and the proposed extensions and additions 10.91 miles; that the latter have no connection with each other, are of no value except to the person owning and operating the present, existing lines of the said company, and are not capable of being operated as independent lines of street railway; and that the comptroller has advertised the sale of said franchise to take place March 29, 1900, and will sell the same at that time in block, at auction, unless restrained, to the irreparable injury of the petitioners, who are remediless in the premises, except through the writ of injunction. The petition then charges, in effect, that the whole proceeding is a scheme to enable the St. Charles Street Railway Company to purchase the franchises at a price below their value; that

the way in which the offer to sell is made precludes full, fair, and free competition, excluding any other than the said company from bidding; that the offer becomes a mere bargaining and sale between the city and the car company; that the ordinance authorizing this to be done is unreasonable, illegal, and void; that the conditions and obligations attached by the ordinance to the sale of the franchises are in violation of existing statutes; that the necessary preliminaries and proceedings required by law were not sufficiently complied with previous to the adoption of the ordinance; that the ordinance was never legally adopted; and that the same is ultra vires and void. The grounds and details of these various charges of illegality, etc., are set forth at length. Finally it is averred that there would be other bidders for said franchises if same were advertised and sold according to law, under valid ordinances, and with opportunity for fair, open, and equal competition. The prayer was for writ of injunction to restrain the sale, and for judgment decreeing the ordinances illegal, null, and void. In a supplemental petition subsequently filed it was averred that an amendment to the ordinance proposed by certain officials of the city, in whom section 86 of the city charter (Act No. 45 of 1896) vested the authority to amend the same, had not been concurred in by a vote of a majority of the members elected to the council, as shown by the ayes and noes called and recorded, and as required by said section 86. The district judge to whom the petitions were presented did not immediately sign the order for injunction, but, instead, directed a rule to issue requiring defendant city to show cause why a preliminary injunction should not be granted on the showing made. Hearing was had, with the result that the judge discharged the rule and entered an order directing the writ of injunction pendente lite to issue. This was followed by an application by the city to dissolve the injunction as in case of giving a bond to indemnify plaintiffs in whatever injury might result to them by reason of the sale of the franchise rights as advertised under the city ordinance, but averred its exemption by law from furnishing bond in legal proceedings; that is to say, asserting the right to dissolve on bond, but claiming legal exemption from giving the bond itself. The district judge denied the application to dissolve the injunction on bond, whereupon the defendant city applied to this court for its writ of mandamus to compel the granting of the order to bond. The court, a majority of the judges concurring, granted the mandamus (see State v. Judge of Civil Dist. Ct., 52 La. Ann. 1275, 27 South. 697), and following this the sale of the franchises took place; the St. Charles Street Railway Company becoming the purchaser thereof. Prior to the trial of the cause upon its merits, plaintiffs filed a second supplemental petition, averring other grounds of nullity of the proceedings taken for the sale of the franchises. The defendant city made answer affirming the

regularity of all its proceedings, due compliance with all the requirements of law, and the validitv of the sale made to the St. Charles Street Railway Companv. The latter corporation intervened to assert and protect its rights, and joined the city in its defense of the suit. It did this by a plea called an "intervening answer." There is and can be no such thing as an "intervening answer" by a third person in a case pending between others. Intervention can be only by petition and citation as prescribed by Code Prac. art. 393. The judge a quo ruled properly in holding the document in question to be a petition in intervention, which required service upon the plaintiffs and defendant. He was about to continue the cause in order to have this service made, whereupon counsel for plaintiffs, objecting and with reservation of their rights, accepted service of the intervention. Subsequently the St. Charles Street Railway Company filed a formal petition in intervention, concluding with a prayer to be made a party defendant to the suit, and that order was made by the judge. We consider the railway company merely an intervener in the suit, "uniting with defendant in resisting the claims of the plaintiffs." Code Prac. art. 389. The court takes occasion, however, to say that an intervener should ask timely service of his petition and citation upon the plaintiff and defendant, and where an intervention, as in this instance, has been filed in ample time for service on the other parties litigant, and for expiration of the legal delay for citation prior to calling the case for trial, and there has been no demand for such citation and service, and none made, the intervener has not the right at the last moment, when the case is called for trial, to obtain time to effect such service. In such case the trial judge would rule correctly were he to hold that the intervener, in default of citation and service of his petition, has no standing in the cause, and, ignoring him, proceed to trial. See Silbernagel v. Silbernagel, 32 La. Ann. 766. On the issues as presented there was judgment below in favor of plaintiffs, decreeing the ordinance assailed to be invalid, and annulling the sale of the franchises made to the St. Charles Street Railway Company thereunder. The City of New Orleans and the railway company appeal. The judge a quo rested his decision solely on the ground that the ordinance directing the sale of the franchises had been so framed as to have the practical effect of preventing any one from bidding at the public offering of the franchises, other than the St. Charles Street Railway Company, whereas the charter requirement is that street-railway franchises must be offered for sale in such way as to be open to free and competitive bidding.

Equity Pleading—Intervening Answer.

Same—Intervener—Laches.

1. The question first to be considered is whether or not this ordinance (being Council Series No. 15,809) was adopted by the city council in the manner and according to the forms pre-

scribed by the city charter. We find that this ordinance was first introduced in August, 1899, and in due time was considered by the council. Various amendments were proposed and adopted, and on November 28, 1899, the ordinance as thus amended was adopted by a yea and nay vote,—the vote standing: Yeas, 26; nays, 0; absent, 2. This was a compliance with the requirement of section 17 of the city charter (Act No. 45 of 1896), which prescribes that no resolution or ordinance, except those relating to investigations and the conduct of parliamentary business, shall have the force of law unless the same receive the votes of a majority of the members elected to the council, and unless on its final passage the yeas and nays are called and recorded. Section 86 of the charter directs that every ordinance granting a franchise, after having been introduced in, considered and passed by, the council in the manner provided for other ordinances, shall be published in full in the official journal for two weeks, and thereafter shall be transmitted to the mayor, whose duty it shall be to cause the comptroller, treasurer, commissioner of public works, commissioner of police and public buildings, and city engineer to publicly assemble in the council chamber for the purpose of considering and passing upon the ordinance so adopted by the council. We find that all this was done in respect to the ordinance under consideration. It further appears from section 86 that the officials named, whom he will denominate the "Franchise Committee," are empowered, or any four of them concurring are empowered, to "approve, amend or reject" the ordinance. Then follows this language: "But no such ordinance, resolution or order so amended shall be considered finally passed until any and all amendments shall have been concurred in by vote of a majority of the members elected to the council, as shown by the ayes and noes called and recorded." It would thus seem that if the franchise committee reject the ordinance that is an end of it, and the proposition fails. In this the franchise committee have authority over the ordinance in the nature of the veto power. If the committee approve the ordinance as it passed the council, no further action by the council is necessary, and the ordinance passes on to the mayor for his approval. But if the franchise committee amend the ordinance, then it must go back to the council with this amendment or amendments, which must be concurred in by the vote of a majority of the members elected to the council, as shown by the ayes and noes called and recorded. In the instant case the franchise committee added one provision to the ordinance. That is to say, they reported it back favorably to the council with one amendment. This amendment was to the effect that all proposing bidders on the franchise as offered at the public sale were to be required to deposit with the comptroller $2,000. In the event of an adjudication under the ordinance, the amount deposited by the successful bidder was to be credited on his bid,

and the other deposits returned to their depositors. The object of this was to provide a fund for paying the expenses incurred in advertising the franchise, etc. When the ordinance with this amendment was returned to the council, a viva voce vote was taken on the amendment, and it was adopted. Then followed a vote by yeas and nays on the ordinance as thus amended, and it was adopted. All that the charter required was that the amendment be "concurred in" by a vote taken by ayes and noes in the council. This "concurrence" might have been had by simply putting the ordinance as amended by the franchise committee on its aye and no vote at once. The franchise committee had power to add that amendment. It did so. It was not required that there be a separate vote on the amendment, and then another on the adoption of the ordinance as thus amended. That would have been the parliamentary situation and requirement had the amendment been proposed in the council by some member thereof. But it was an amendment made to the ordinance by another and a different body, vested with power to do so, and all that was thereafter required of the council was by an aye and no vote to concur in it. This might have been done by such vote taken simply on the proposition to concur in the amendment, or by a like vote taken on the proposition to adopt the ordinance as amended by the franchise committee. By means of either, the concurrence by aye and no vote as demanded by the charter would be had. The latter of the two courses was resorted to. It sufficed. But it is contended that the ayes and noes must not only be called, but recorded as well, and that a mere record kept by roll call of the yeas and nays, as was the case here, does not meet the requirement of the charter. The evidence shows that the way it was done in this instance is the way it has been done for years past, under the present and former charters of the city. We cannot say it is not a sufficiently substantial compliance with the direction of the charter in this respect, however much we may be disposed to criticise the method. It were better to call the ayes and noes and record the same in the minutes by giving there the names of those who vote "Aye," and the names of those who vote "No." And in the publication of the minutes it should so appear; for one of the main purposes of the requirement is to acquaint the public—to give information to constituencies of—how the members of the council voted. The further requirement of section 86 of the charter is that, after an ordinance granting a franchise shall have been thus finally passed, it shall be transmitted to the mayor for his consideration, and if it meet with his approval he shall sign and publish the same, and it shall have the effect of law. In this instance the mayor signed and published the ordinance.

2. The next question to be considered is, was the advertisement of the sale of the franchise under the ordinance sufficient in length of time? Section 87 of the charter prescribes that

no franchise for the operation of a street railway shall be disposed of "except after three months' publication in the official journal of the terms and specifications of such franchise." We find that the first advertisement of the proposed sale of the franchise appeared in the official journal of December 28, 1899, and that it continued until the day of the sale, March 29, 1900. This was 90 full days, without counting the day (December 28th) the advertisement first appeared, nor that (March 29th) on which the sale took place. But the requirement of the charter is that the advertisement should be for "three months," not 90 days. This means calendar months. Omitting December 28th, the advertisement ran on the 29th, 30th, and 31st of December. January was one month. February was one month. Omitting the 29th of March, the advertisement ran in March 28 days. Add the three days in December, and we have 31 days, or the greatest number of days in any one calendar month.

3. Was this ordinance so framed, and was the sale of this franchise so advertised and effected, as to render free and open competition impracticable, and to preclude other bidders than the St. Charles Street Railway Company? Section 87 of the charter provides that, after three months' publication of notice thereof, the sale of a street-railway franchise shall be publicly offered by the comptroller, and adjudicated to the highest bidder. The charter makes reservation, however, of the right of the council to reject any and all bids, and the ordinance as advertised so stated. The requirement of the law is that the franchise must be sold to the person or corporation offering the highest percentage of gross annual receipts to be derived from such franchise during the time thereof, first deducting the amount paid each year for taxes. What the ordinance directed the comptroller to sell was: "The franchise, right of way and right to construct, maintain and operate, and the extension of the present right and franchise to operate and maintain the lines of street railway, with the tracks, curves, switches and other appurtenances as they now exist, and as now owned by the St. Charles Street R. R. Co. for the term of fifty years from the date of the expiration of the said company's existing franchise, to-wit: April 11, 1906, and on all the authorized extensions of the route hereinafter provided for, for the unexpired term of said existing franchise in addition to the extension of fifty years above mentioned, over all the streets and places in the city, hereinafter set forth, upon the following terms, conditions, specifications, and with the following additions of route." Then follow the description of the existing lines of the St. Charles Street Railway Company, and that of the authorized extensions. The whole is directed to be sold in block, and the object was to add the new lines to the existing route, with the view of the extension of that system of street railway more largely over the city. The new lines added to the old system

nearly doubled the mileage of the old. One fare only over all the lines—the old and new—was stipulated to be charged. The construction of the new lines was to begin within 90 days after the signing of the contract, and be completed within 12 months thereafter. Under its existing contract with the St. Charles Street Railway Company the city of New Orleans was obligated, at the expiration of the present or old franchise, on April 11, 1906, to take at its then value the rolling stock, equipment, depot, and fixtures of the company. This obligation the purchaser of the new franchise was required to assume in the city's stead, and to pay the price in addition to the regular bid; and to secure the performance of this, as well as the other stipulations of the contract, it was required that, as a condition precedent to the receiving of a proposed buyer's bid, he should deposit with the city treasurer the sum of $50,000,—the deposit of unsuccessful bidders to be immediately returned; that of the successful bidder to be retained as security, as above stated. In case the St. Charles Street Railway Company became the purchaser the city was to be relieved of its obligation to take the property in April, 1906; the ownership of that corporation continuing. Another stipulation was that the purchaser of the franchise should, during the existence thereof, keep in good order and repair, and pave or repave as required, so much of the streets through which the lines of the railway ran as is comprised between the rails and between the tracks, and for one foot on each side of the track. When the franchise terminates, on the 11th of April, 1956, it is stipulated that the railroad track, rolling stock, equipment, etc., should revert to the city of New Orleans, upon the payment by it of a valuation to be ascertained in the manner pointed out by the ordinance. The bidders were required, also, to deposit with the comptroller the sum of $2,000 each. To the unsuccessful bidder this deposit was to be immediately returned. That of the successful bidder was to be retained as a fund out of which should be paid the cost of advertisement and other expenses of the sale. But the amount thereof was to be credited on his bid. At the sale of the franchise thus offered, the St. Charles Street Railway Company proved to be the only bidder, and its bid was for 5 per cent. of the gross annual receipts, less taxes. The franchise was thereupon adjudicated to it, and subsequently the sale was approved by the council, and the formal contract executed by the mayor. The extensions were four in number, connecting with the existing St. Charles Street Railway Company's lines at as many points. They have no connection with each other, and cannot be operated profitably as independent lines. Were a purchaser to construct and operate these extensions as a whole, as independent lines, there would be no bidders. The same is true if any one of them were offered. It would not pay. Yet they run through parts of the city where there is great want of improved facilities of trans-

portation, and great demand for the same. The only chance to have the lines represented by the extensions constructed is by attaching the same to existing profitable lines when the time comes to renew or resell the franchise thereof. This has been the policy of the city in past years in respect to other extensions on other lines in renewal of the franchises thereof. While the present charter directs the granting or renewal of street-railway franchises to be offered to the highest bidder at public sale, there is nothing in the charter, and nothing intended thereby, prohibiting the city council from looking after and securing the extension of street-car facilities in parts of the city needing the same, by attaching franchises therefor to existing franchises coming up for sale in renewal, and selling the same in block as continuous lines, forming a complete system, with one fare over the whole. This is in the interest of the public,—in the interest of the development of the city. The true policy of the city is as much to be found in promoting such extensions as it is in looking after the pecuniary considerations incident to the sale of such franchises. With regard to the franchise under consideration the situation was this: The St. Charles Street Railway Company applied to the city several years in advance of the expiration of its existing franchise (but not longer than was customarily done by railroad companies) for a renewal thereof. It asked only for a renewal as to its existing lines. At once it was met by a demand for the extensions as finally ordered. Members of the city council refused to introduce an ordinance looking to the renewal unless the extensions were embodied therein as part of the system. The people in the sections wanting the extensions took the matter up, and by public meetings and petitions made clamorous demand for the same. For months this matter was under consideration. The railroad company did not want and were not seeking the extensions. It was the city council, representing the people behind its members, who made the demand. By means of the extensions thoroughfares would be opened not only for reaching the homes of the people, their schools and churches, but for the fire engines, police patrol, etc. By tacking on to a valuable franchise, seeking renewal, the stipulation that the extensions should be constructed and operated as a part thereof, these thoroughfares could be obtained. We are of the opinion the council could legally pursue this policy, and while its exercise may have resulted in some advantage to the owners of the old or existing franchise, in the matter of bidding at the sale, we do not find that other bidders were shut out from competing. Other persons or corporations could have put themselves in position to have become competitors. The proposed extensions touched, crossed, or came in contact with the lines of other street-railroad companies. The advantage to the St. Charles Street Railway Company was not of its seeking or connivance, and

Same—Public Action—Position of Bidder.

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resulted merely from the situation it occupied as owner of the existing lines to which the extensions were attached. It was not, therefore, an illegal advantage. No fraud or collusion or undue influence is shown, and, as far as the city was concerned, its rights were protected against the consequences of a bid too low in amount; for its guardians had the right reserved to reject any and all bids. There was, we think, a sufficient compliance with the requirements of the charter, in the matter of such sale, to maintain the same. With regard to the amount of money required to be deposited by bidders, to protect the city and to enforce compliance with the obligations of the contract, the same was within the just discretion of the council, and the court will not interfere therewith. The same is true with regard to the stipulation that the purchaser of the franchise should be required to keep in good order and repair, and to pave and repave when required, the portions of streets occupied by the railway tracks, and the other stipulation that a purchaser, other than the owner of the existing franchise, should relieve the city of the obligation it is under to take at its valuation the rolling stock, equipment, fixtures, etc., of the company now operating the existing lines.

Grants of Franchises—Municipal Discretion.

We are constrained to differ from our learned Brother of the district court in the conclusion he arrived at; and, for the foregoing reasons, it is ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, and it is now ordered and decreed that the injunction herein sued out be dissolved, and the demand of the plaintiffs be rejected at their costs in both courts.

NOTES.

Illegal Action by Municipal Body—Right of Taxpayers to Implead—Bona Fides.—The *dicta* in the opinion of the principal case to the effect that the ulterior motives of taxpayers who implead the city government for an abuse of corporate powers may be investigated and that, if the plaintiffs are mere interposed persons who desire to subserve the interest of others who prefer to keep in the back ground they will have no standing in court, is controverted by many of the decisions. In Mock *v.* City of Santa Rosa, 4 Mun. Corp. Cas. 483, the court says: "It is further contended that the plaintiff is not the real party in interest, but that the action is prosecuted in the interest of the Santa Rosa Waterworks, a private corporation then supplying the city with water; and that this action is one of a series instituted to hinder and delay the construction of waterworks by the city. * * * It does not appear that the defendants offered or gave any evidence tending to support said allegation that plaintiff is not the real party in interest, but whether they did or not, the issue is immaterial. In Mazet *v.* City of Pittsburg, 137 Pa. St. 548, 20 Atl. 693, it was held, in effect, that if the plaintiff is not a mere volunteer, but has a direct and substantial interest in the controversy, being one who is liable to be taxed, in common with the general public,

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for the work contracted for, his ulterior motives will not disqualify him."

In Mazet *v.* City of Pittsburg, 137 Pa. St. 548, 20 Atl. 693, mentioned in the above quotation the averments were "that the bill is not filed in good faith by the plaintiff, but on the contrary thereof he is merely a cover; and in fact the said plaintiff represents the Warren-Scarf Asphalt Paving Company which was an unsuccessful competitor in the bidding for the contract set out in the bill; and that the bill is filed at the instance, suggestion and request of said company, and for its use; and that the said company bears the cost and expenses thereof and the bill is therefore a collusive one." The court held that the plaintiff as a taxpayer and citizen had a clear legal right to maintain the suit in his own name and that his ulterior motives were immaterial. Citing Sanford *v.* Railroad Co., 24 Pa. St. 370; Coleman *v.* Railway Co., 10 Beaver 1; Ramsey *v.* Gould, 57 Barb. 398; Railroad Co. *v.* Collins, 40 Ga. 582; Broxam *v.* Railway Co., L. R. 3 Ch. 336, *distinguishing* Robson *v.* Dodds, L. R. 8 Eq. 301, and Forrest *v.* Railway Co., 4 De Gex, F. & J. 126.

In Times Pub. Co. *v.* City of Everett, 9 Wash. 518, 43 Am. St. Rep. 865, the petitioner for an injunction restraining the city of Everett from awarding a contract was itself a bidder for the same contract. It was held that the direct interest in the controversy possessed by the petitioner as a taxpayer was sufficient to enable it to maintain a suit for such injunction no matter what its ulterior motives may have been in prosecuting the suit. The court, in its opinion, said: "Kimball *v.* Hewitt, 2 N. Y. Supp. 697, is cited in support of the position that appellant ought not to be allowed to maintain an action of this kind, in view of the disclosure that its interest is prompted by other considerations than its liability to excessive taxation. Examination of the opinion in that case shows several other important matters to have entered into the decision, chief among which was that the action appeared to be in the interest of a bidder which had attempted to perpetrate a fraud on the city by withdrawing its bid, which was the lowest one made, and to recover a certified check which would have been forfeited had it refused to enter into a contract."

Analogous Question as to Private Corporations—Suits by Stockholders to Enjoin Corporate Action—Collusion.—But the analogous question whether when a stockholder brings a suit on behalf of himself and other stockholders to enjoin *ultra vires* action by the corporate managers the fact that such stockholder is working in the interest of another corporation will go to defeat his right to sue is usually answered by the courts in the affirmative. The following paragraph taken from the opinion in Beshoar *v.* Delos, 1 Am. & Eng. Corp. Cas., N. S., 296, 6 Colo. App. 323, well illustrates the position taken by the majority of the courts.

"It is a well-settled principle that whenever it is made to appear that the suit was not begun in good faith by a shareholder for the protection of his rights, but was in reality originated and prosecuted by another corporation for its own benefit, the court will consider what led the plaintiff to institute his suit, and finding some other reason than a desire to protect stockholders' rights, will refuse to entertain the bill. Forrest

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v. Railway Co., 4 De Gex, F. & J. 125; Filder *v.* Railroad Co., 1 Hem. & M. 489; Belmont *v.* Railway Co., 52 Barb. (N. Y.) 637; Waterbury *v.* Express Co., 50 Barb. 157; Camblos *v.* Railroad Co., 4 Brewst. (Pa.) 563, Fed. Cas. No. 2,331. Naturally, the cases respecting this proposition are limited, since the question could not often arise."

On the other hand in Dinsmore *v.* Central R. Co., 19 Fed. Rep. 153, it was held that the fact that some of the officials of a rival corporation, with which complainant had close business relations, had been friendly and active in giving him aid in the preparation of his case, will not sustain a charge of bad faith and render his suit collusive. See also, as opposed to the weight of authority, Sanford *v.* Railroad, 24 Pa. St. 373; Coleman *v.* Eastern Counties, 10 Beav. 1; Central R. R. Co. *v.* Collins, 40 Ga. 582, all of which are cited with approval by the court in Mazet *v.* City of Pittsburg, 137 Pa. St. 548, 20 Atl. 693, which is discussed, *supra*. And in Bloxam *v.* R. Co., L. R., 3 Ch. 337, where the question was whether the plaintiff was disqualified by the fact that he had purchased his shares a short time before he filed his bill, the court said: "However questionable the mode of the plaintiff's introduction to the company may have been, he has an actual interest in the subject-matter of the suit. In this respect he differs from the plaintiff in the case of Forrest *v.* Manchester, etc., R. Co., 7 Jur., N. S., 887, who stated in his examination that the directors of a rival company directed the institution of the suit and indemnified him against costs; and LORD WESTBURY dismissed the bill on the ground that the plaintiff, coming in the character of a shareholder in the company, and stating that it was not his own act but an act that he had been directed to do by the other company, the suit was an imposition on the court. The plaintiff may be properly described in the words of LORD JUSTICE KNIGHT BRUCE, in Rogers *v.* Oxford, etc., R. Co., 2 De G. & J. 662, as a person who was made 'a shareholder in the company for the mere purpose of instituting this litigation.' But if the question put by VICE CHANCELLOR WOOD in Filder *v.* London, etc., R. Co., 1 H. & M. 493, is repeated in this case: 'Is the suit *bona fide* plaintiff's own suit, or is he merely the hand by which some one else acts?' the correct answer must be, that he consented to become the instrument of others, but for that purpose he has acquired an interest which gives him a common cause with them. I cannot say that, having chosen to place himself in this invidious position, with a real interest, though of no great amount, at stake, he is not to have the ordinary rights of a plaintiff on account of the motive which led him to acquire the means of appearing in that character." See generally, 27 Am. & Eng. Enc. Law 400, and *notes*.

CITY OF RICHMOND
v.
LEAKER.

(*Supreme Court of Appeals of Virginia, Dec. 13, 1900.*)

[37 S. E. Rep. 348.]

Declaration—When Bills of Particulars Unnecessary.—In an action against a city for injuries alleged to have resulted from its negligence in unlawfully permitting a sidewalk to be obstructed, the declaration set forth in detail the character of the action, and the circumstances leading to it, and alleged that plaintiff thereby had his right arm broken between the elbow and shoulder, and became sick, sore, lame, diseased, and disordered, and so remained from thence hitherto, during all of which time he thereby suffered and endured great pain, and was prevented from attending to and transacting his necessary and lawful game business, and was forced to give it up, and was also disabled from pursuing any business requiring the use of his right arm, and that he had been obliged to expend $500 to get cured of his wounds, sickness, etc. *Held*, that the declaration gave defendant complete notice of the nature and character of plaintiff's claim, and that no further bill of particulars was required.

Streets and Sidewalks—City Authorizing Obstruction—Duty of Pedestrian.*—In an action against a city for injuries alleged to have resulted from its negligence in unlawfully permitting a sidewalk to be obstructed, it was error to refuse instructions intended to inform the jury that defendant had a right to permit persons erecting buildings to use a portion of the streets and sidewalks for the deposit of building materials and appliances therein, and that, where they are deposited in a street, and are open and obvious, travelers or pedestrians passing thereby must observe greater care to avoid accident than would otherwise be necessary.

Same—Same—Same.—Where a traveler or pedestrian, in passing along a street, sees an obstruction therein, it is his duty to exercise greater care, whether the circumstances are sufficient to arouse his fear or not.

Same—Contributory Negligence—Burden of Proof.—In an action against a city for injuries alleged to have resulted from its negligence in unlawfully permitting a sidewalk to be obstructed, the jury were instructed that the burden of proving defendant guilty of negligence rested on plaintiff, and that, if defendant sought to relieve itself from liability by reason of plaintiff's contributory negligence, the burden of proving such negligence rested on it. *Held*, that the instruction should have concluded as follows: "Unless such contributory negligence was disclosed by the plaintiff's evidence, or could be fairly inferred from the circumstances."

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*See Cloney *v.* City of Kalamazoo, 4 Mun. Corp. Cas. 640, and extensive *note*; Lyon *v.* City of Red Wing, 1 Mun. Corp. Cas. 483, and note.

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v. Railway Co., 4 De Gex, F. & J. 125; Filder *v.* Railroad Co., 1 Hem. & M. 489; Belmont *v.* Railway Co., 52 Barb. (N. Y.) 637; Waterbury *v.* Express Co., 50 Barb. 157; Camblos *v.* Railroad Co., 4 Brewst. (Pa.) 563, Fed. Cas. No. 2,331. Naturally, the cases respecting this proposition are limited, since the question could not often arise."

On the other hand in Dinsmore *v.* Central R. Co., 19 Fed. Rep. 153, it was held that the fact that some of the officials of a rival corporation, with which complainant had close business relations, had been friendly and active in giving him aid in the preparation of his case, will not sustain a charge of bad faith and render his suit collusive. See also, as opposed to the weight of authority, Sanford *v.* Railroad, 24 Pa. St. 373; Coleman *v.* Eastern Counties, 10 Beav. 1; Central R. R. Co. *v.* Collins, 40 Ga. 582, all of which are cited with approval by the court in Mazet *v.* City of Pittsburg, 137 Pa. St. 548, 20 Atl. 693, which is discussed, *supra*. And in Bloxam *v.* R. Co., L. R., 3 Ch. 337, where the question was whether the plaintiff was disqualified by the fact that he had purchased his shares a short time before he filed his bill, the court said: "However questionable the mode of the plaintiff's introduction to the company may have been, he has an actual interest in the subject-matter of the suit. In this respect he differs from the plaintiff in the case of Forrest *v.* Manchester, etc., R. Co., 7 Jur., N. S., 887, who stated in his examination that the directors of a rival company directed the institution of the suit and indemnified him against costs; and LORD WESTBURY dismissed the bill on the ground that the plaintiff, coming in the character of a shareholder in the company, and stating that it was not his own act but an act that he had been directed to do by the other company, the suit was an imposition on the court. The plaintiff may be properly described in the words of LORD JUSTICE KNIGHT BRUCE, in Rogers *v.* Oxford, etc., R. Co., 2 De G. & J. 662, as a person who was made 'a shareholder in the company for the mere purpose of instituting this litigation.' But if the question put by VICE CHANCELLOR WOOD in Filder *v.* London, etc., R. Co., 1 H. & M. 493, is repeated in this case: 'Is the suit *bona fide* plaintiff's own suit, or is he merely the hand by which some one else acts?' the correct answer must be, that he consented to become the instrument of others, but for that purpose he has acquired an interest which gives him a common cause with them. I cannot say that, having chosen to place himself in this invidious position, with a real interest, though of no great amount, at stake, he is not to have the ordinary rights of a plaintiff on account of the motive which led him to acquire the means of appearing in that character." See generally, 27 Am. & Eng. Enc. Law 400, and *notes*.

CITY OF RICHMOND

v.

LEAKER.

(*Supreme Court of Appeals of Virginia, Dec. 13, 1900.*)

[37 S. E. Rep. 348.]

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City of Richmond *v.* Leaker

Appeal from law and equity court of city of Richmond.

Action by one Leaker against the city of Richmond. From a judgment for plaintiff, defendant appeals. Reversed.

Pollock & Puller and C. V. Meredith, for appellant.

Henry R. Pollard, for appellee.

Harrison, J. This action brought to recover damages for personal injuries alleged to have been sustained by the plaintiff in consequence of the negligence of the defendant in unlawfully permitting the sidewalk of one of its streets to be obstructed.

The first error assigned is the action of the court in accepting as sufficient the statement filed by the plaintiff, in response to the demand of the defendant, as a bill of particulars of his claim; the contention being that the statement filed is but a reiteration of the allegations of the declaration, and not such an itemized account of the claim as is contemplated by section 3249 of the Code. That section provides that "in any action or motion the court may order a statement to be filed of the particulars of the claim, or of the ground of defence; and if a party fail to comply with such order, may, when the case is tried or heard, exclude evidence of any matter not described in the notice, declaration or other pleading of such party, so plainly as to give the adverse party notice of its character."

This section, in the same words, is found in the Code of 1849, and it appears from the report of the revisors (1849) that it was taken from the Massachusetts rules adopted for the purpose of simplifying and shortening pleading. See sections 48, 49, 24 Pick. 399.

Section 3248 of the Code, like the Massachusetts rule (48), provides that in actions of assumpsit the plaintiff shall file with his declaration an account stating distinctly the several items of his claim, unless it be plainly described in the declaration. There would have been no necessity for this section, if the contention were well founded that an itemized statement was required in every case by section 3249. We think it clear that the object of section 3249 was to provide that in actions other than assumpsit the plaintiff should be required to give the defendant full notice of the subject or character of his claim; that, if the declaration or other pleading did not present distinctly the grounds or subject of the action, the plaintiff should, if required to do so, file such a statement of particulars as would put the defendant in possession of the character thereof. In Minor's Institutes (referring to section 3249) the learned author says: "It is provided that in any action the court may require the particulars of the claim or the ground of defense to be filed, which might, in practice, be often judiciously employed to define the subject of the controversy." 4 Minor, Inst. pt. 1, p. 763.

In the case at bar, after setting forth in detail the character

of the accident, and the circumstances which led to it, the declaration then alleges that the plaintiff thereby had his right arm broken between the elbow and shoulder, and became sick, sore, lame, diseased, and disordered, and so remained from thence hitherto, during all of which time he thereby suffered and endured great pain, and was prevented from attending to and transacting his necessary and lawful business, and was forced to give up and discontinue his fish, oyster, and game business, which he had been conducting for a number of years, and is also disabled from pursuing any calling or business requiring the use of his right arm; and that he had been obliged to pay, lay out, and expend $500 in endeavoring to get healed and cured of his wounds, sickness, etc.

We are of opinion that the declaration in this case gave the defendant complete notice of the nature and character of the plaintiff's claim, and that no further bill of particulars was contemplated or required by section 3249.

The second error assigned is the refusal of the court to give instructions "a" and "b" asked for by the defendant.

These instructions were intended to inform the jury (1) that the defendant had the right to permit persons erecting buildings to use a portion of the streets and sidewalks for the deposit of building materials and building appliances therein; and (2) that, where such materials and appliances are deposited in a street, and are open and obvious, travelers or pedestrians passing along such street at the point thus obstructed must observe greater care to avoid accident than would otherwise be necessary. Without holding that the instructions were drawn with entire accuracy, it is sufficient to say that these were sound propositions of law, were applicable to the case, and that the jury should have been so informed. It is contended that instruction No. 2L given for the plaintiff covers the latter of the two propositions mentioned. That instruction is itself erroneous, in this: that it limits the greater care to be exercised under the extraordinary circumstances to the judgment of the plaintiff as to the necessity for greater care, by providing that "if the surrounding circumstances were such as to arouse the fear of the plaintiff," whereas the law imposed upon the plaintiff, when he saw the obstruction, the duty of exercising greater care, whether those circumstances were sufficient to arouse his fear or not.

Instruction No. 3L given for the plaintiff is in these words: "The court instructs the jury that the burden of proving the defendant guilty of negligence rests upon the plaintiff, and that, if the defendant seeks to relieve itself of liability by reason of the plaintiff having been guilty of contributory negligence, the burden of proving such contributory negligence rests upon the defendant." This instruction should have concluded as follows: "Unless such contributory negligence was disclosed by the plaintiff's evidence, or could be fairly in-

ferred from the circumstances." Kimball v. Friend, 95 Va. 125, 27 S. E. 901; Railroad Co. v. Bruce, 97 Va. 92, 33 S. E. 548.

As the judgment must be reversed for error in the instructions, it is unnecessary to consider other assignments which relate to questions that need not arise on another trial.

For these reasons the judgment must be reversed, the verdict of the jury set aside, and a new trial awarded.

DUTTON *et ux.*

v.

BOROUGH OF LANSDOWNE.

(*Supreme Court of Pennsylvania, March 18, 1901.*)

[48 Atl. Rep. 494.]

Defective Sidewalk—Injury to Pedestrian—Joint Action against Municipality and Property Owner.—One injured by a defective sidewalk cannot sue the municipality and the property owner in the same action, they not being joint tort feasors, though both may be liable,—the owner for breach of his primary duty, and the municipality for breach of its secondary duty.

Same—Dismissal for Misjoinder of Actions.—The declaration being for a joint tort, and the case going to the jury as against both defendants, and the evidence failing to show that they were joint tort feasors, there can be no recovery against either, there being a misjoinder of actions.

Appeal from superior court.

Action by Thomas Dutton and wife against the borough of Lansdowne and another. From a judgment of the superior court affirming a judgment for plaintiffs against the borough on a verdict against it alone, it appeals. Reversed.

Lewis Lawrence Smith, for appellant.

Gilpin Robinson, for appellees.

Case Stated.

Potter, J. The theory upon which the municipality and the property owner were sued jointly in this case is radically wrong. As a result the judgment must be reversed, for the reason that the action was brought in a form which cannot be sustained. The distinction between the duty of the municipality and the property owner is clearly stated in Brookville Borough v. Arthurs, 130 Pa. 501, 18 Atl. 1076, by Justice Sterrett, in which he says: "The borough and Mr. Arthurs were in no sense of the term joint wrongdoers. They did not co-operate in the same

wrongful act in such way as to make them joint wrongdoers. While it is true that the borough could not deny its liability for neglect of its general duty to see that the streets and sidewalks thereof are kept in reasonably good and safe condition, it cannot be contended that the corporation in any way cooperated with the defendant in his neglect to perform the duty which, as between it and himself, he assumed to discharge. As shown by the evidence, the true relation of the defendant to the borough was that of a resident property owner bound by the ordinance, and still further by his express promise, to keep the sidewalk in question in good repair. The claim is not for contribution, but to recover from the defendant the amount which the plaintiff was compelled to pay in consequence of his neglect to do what he should have done, and expressly promised to do." The authorities all seem to agree that the plaintiff has the right, in cases of this character, to sue either the municipality or the owner, but it does not follow that both can be sued jointly; the measure of responsibility being very different. In Lohr v. Philipsburg Borough, 156 Pa. 246, 27 Atl. 133, which was a sidewalk case, the lower court held the borough to the same measure of liability as an employer. But this court, speaking by our Brother Mitchell, in reversing, said: "There is a clear distinction to be taken between the duties in the two cases. That of the master is primary and absolute, to know and to do, while that of the borough, or of any municipality, as to sidewalks, is secondary and supplemental, to see that the property owners makes and maintains a safe pavement; and its breach of duty is not in failing to do the work, but in failing to compel the owner to do it." And again, in Duncan v. City of Philadelphia, 173 Pa. 550, 34 Atl. 235, this court said: "It is the duty of a municipality to exercise a reasonable supervision over its sidewalks; but as the first duty in relation to them rests upon the property owner, and that of the city is secondary only, it is not liable for defects without notice, actual or implied, of their existence." And again, in Mintzer v. Greenough, 192 Pa. 137, 43 Atl. 465, the court says: "It is the primary duty of property owners along a street to keep in proper repair the sidewalks in front of their respective properties; hence it is that, owing to this primary liability, many cases exist in this state in which, after recovery from the municipality, the latter has successfully recovered over from the property owner on account of his breach of his primary duty to keep the sidewalk in a safe condition." We repeat, therefore, that it does not follow that because both the property owner and the borough may be liable, each for the neglect of a particular duty, they may be joined in an action of tort. The breach of duty here is not like that of maintaining a party wall, which is equally incumbent upon both parties. The case of Durkin v. Coal Co., 171 Pa. 193,

Defective Sidewalk—Injury to Pedestrian—Joint Action against Municipality and Property Owner.

33 Atl. 273, 29 L. R. A. 808, has been cited as analogous to the view taken by the trial court. But that case did not turn upon the precise point being considered here, and the court did not pass upon any difficulty growing out of the pleadings. It is difficult to see where any authority for sustaining the judgment in this case can be found in Coal Co. v. Richards' Adm'r, 57 Pa. 143, or in Leidig v. Bucher, 74 Pa. 65, as they are authority for the doctrine that defendants who have not joined in committing a wrong should not be joined in the same action. Neither does Laverty v. Vanarsdale, 65 Pa. 507, and other similar cases cited, touch the point here. If two defendants be sued jointly for a tort, and the evidence is not sufficient to hold one, there may be a discontinuance as to that one, and the trial may proceed as to the other. In such case the joint action does not fail because the tort is not joint, if committed, but for the reason that the evidence fails to show any concert of action. But where the declaration is for a joint tort, and the case goes to the jury as against both defendants, if, under such circumstances, the evidence fails to show that the defendants were joint tort feasors, it is error to permit a recovery against one or both. Such a case would show not a mere misjoinder of parties, but a misjonder of causes of action. In any view of the question, the relation between the municipality and the owner presents separate and distinct causes of action, and they cannot be sued jointly. The judgment is therefore reversed.

Same—Dismissal for Misjoinder of Actions.

CITY COUNCIL OF AUGUSTA

v.

THARPE.

(*Supreme Court of Georgia, March 28, 1901.*)

[38 So. Rep. 389.]

Personal Injuries—Obstruction in Street—Verdict Not Excessive.—On the trial of an action to recover damages for personal injuries received by one using the streets of a city, in consequence of an obstruction therein, the evidence showing not only that the plaintiff received a serious hurt, but that he suffered much pain, a verdict for $300 cannot be set aside as excessive.

Instructions—When Error Insufficient to Require New Trial.—Though a particular instruction, taken alone, may be open to the criticism that it required a given qualification, yet, where it plainly appears that elsewhere in the charge this very qualification of the doctrine laid down in such instruction was so distinctly and clearly stated as that the jury were not mislead as to the true law, the giving of the instruction will not require the granting of a new trial.

City Council of Augusta *v.* Tharpe

Streets and Sidewalks—Condition—Duty of City.—It is the duty of the authorities of a city to keep and maintain the sidewalks thereof in a reasonably safe condition for public use, and this duty is not performed by keeping in such condition that part of the sidewalk only which is most generally used.

Same—Wire across Street—Obstruction—Question for Jury.*—Whether a wire stretched along the outer edge of a sidewalk, about four feet from the ground, and fastened to two poles, by contact with which the plaintiff was injured, was an obstruction to the safe use of the streets, was a question of fact for the jury to determine, under proper instructions from the judge.

Same—Child Playing on Streets Incidentally—No Bar to Recovery.*—Relatively to the city, it was not error for the judge to charge the jury that if the plaintiff, a child of 12 years, was a passenger upon the street, and was injured by an obstruction on the street while playing thereon, and such playing was simply incidental, it would be no bar to recovery, if the city was negligent.

Same—Pedestrian Crossing at Place Other Than Crosswalk.*—It was not error to refuse to charge the jury that one passing from the street to the sidewalk, or the reverse, in a city, at any point other than a crosswalk, has no reason to expect a safe passageway, and must therefore do so at his own risk.

The verdict was supported by the evidence.

(Syllabus by the Court.)

Error from city court of Richmond county; W. F. Eve, Judge.

Action by Robert Tharpe against the city council of Augusta. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. H. Barrett, for plaintiff in error.

A. S. Ulm and Ganahl & Ganahl, for defendant in error.

Little, J. Robert Tharpe, by his next friend, brought an action against the city council of Augusta to recover damages for personal injuries alleged to have been sustained by him by reason of defendant's negligence, in the following manner: On December 28, 1898, while on one of the streets of the city of Augusta, he had occasion to cross the street, as he had a right to do. That while doing so he ran against a wire, projecting from which were many sharp and dangerous points, similar to a barbed wire, which defendant had for many months prior to this time allowed to remain stretched along the edge of the sidewalk. By his contact with the wire he was severely cut and otherwise injured, suffered much pain therefrom, and was kept from his work and school, and his face permanently disfigured. The defendant denied generally that it was in any manner negligent. The evidence for the plaintiff made the following case: Plaintiff

Case Stated.

*See notes at end of case.

was 12 years old, and was engaged in the business of delivering a newspaper called the "Herald" to its subscribers in certain portions of the city every afternoon, from which he derived an income. On the day he was injured he was at the newspaper office with several companions, waiting for the issue of the paper. Plaintiff, with two others, went across the street and stood a few minutes. While there he playfully struck one of his companions and "sprung around" and started to cross the street to the Herald office. As he did so he ran against and struck this wire, which was fastened to two telegraph poles 4 or 5 feet apart, and about the height of plaintiff's cheek from the ground. This wire was stretched along the curbing, and parallel to it. There was no regular street crossing where it was situated, though a few feet from its end there was a crossing from the street to a blacksmith shop on that side of the street. The sidewalk was 6 or 8 inches higher than the street at this point. The wire was from 10 to 20 feet from where his companion was standing when plaintiff struck him. The sidewalk was 8 or 10 feet wide. The evidence as to the condition of the wire was conflicting. One of the witnesses testified that there were several wires twisted together, and full of sharp points,—"mostly points, and not much wire"; another, that it was made of several strands of slick hay wire twisted together with a stick. In walking along the sidewalk, one would not strike this wire unless he attempted to cross the street, and it was probably placed there to keep horses from backing on the sidewalk. It had been there eight or nine months, though plaintiff did not know it was there. Another child had previously been injured by the same wire. It was removed the day after the accident, at the request of a policeman. Plaintiff was seriously injured in the face and head, and kept from school and work for several weeks, suffering in the meantime considerable pain. The details of his injuries were fully set forth, and it appeared from the evidence that his face would be permanently disfigured by a scar. The jury returned a verdict for the plaintiff for $300. Defendant filed its motion for a new trial, which being overruled, it excepted.

Personal Injuries—Obstruction in Street—Verdict Not Excessive.

1. One of the grounds on which a new trial was sought was that the verdict was excessive. The evidence having shown not only serious hurt to the plaintiff, but also that he suffered much from pain, it cannot be ruled that the verdict was excessive.

2. It is also alleged that the following instruction given to the jury was error: "If you find from the evidence that the plaintiff was a traveler upon the streets of Augusta, and that while there he was injured by an obstruction, and that under the evidence it was negligence on the part of the city to permit it to be there, then it would be your duty to return a verdict for the plaintiff." The error alleged is that it was not accompanied with a further charge that plaintiff would be

defeated if it was shown that he could have avoided the injury by the use of ordinary care, and was further error in not stating that it was necessary for the city to have known, either actually or presumptively, of the existence of the obstruction, before it would have been liable. While, as a proposition of law, the charge, to be entirely sound, needed to be qualified, we find that in his general charge the judge fully instructed the jury on the law applicable to the legal propositions which it is contended he should have incorporated in the particular part of the charge on which error is assigned, and therefore the objection made cannot be sustained.

Instructions—When Error Insufficient to Require New Trial.

3. The following charge is also alleged to have been erroneous: "The duty of the city is to keep a sidewalk reasonably safe for public use. That extends to all of the sidewalk intended for travel by the public as a thoroughfare, and is not confined to keeping in a safe condition a separate part only of the sidewalk which happens to be most generally used." The specific error of this charge as claimed is that it instructed the jury that it was incumbent on the city to keep that portion of the sidewalk immediately along the curbing, whether used longitudinally or laterally, reasonably safe for public use. We do not think that the judge erred in giving this charge. It was in the language which this court used in making its ruling in the case of City of Atlanta v. Milam, 95 Ga. 135, 22 S. E. 43, and contains, as we think, a correct proposition of law. Mr. Jones, in his work on the Negligence of Municipal Corporations (section 77, on authority states the rule to be that "the whole of the street must be kept ready for use, because if any portion is neglected there is probable danger that some member of the public will be injured, and the authorities should not expose individuals to this danger." And in section 78 of the same work the author says: "The municipality should not allow obstructions or excavations to adjoin the traveled way which will render its use unsafe and dangerous." Mr. Tiedeman, in his work on Municipal Corporations (section 300), states the rule thus: "The public are entitled to the use of the whole street from side to side and from end to end." In Elliott, Roads & S. § 613, the author says: "Cities are liable for negligently permitting unguarded excavations near the line of the road or street, a well as for negligently allowing obstructions likely to cause injury to be placed upon the way or near the line. * * * It may be said, in a general way, * * * that cities and incorporated towns are liable for any wrongful act which makes the use of the way unsafe, whether it is done by the corporation itself or by a third person." This court, in the case of Mayor, etc., of City of Atlanta v. Perdue, 53 Ga. 607, in dealing with the question, said: "The general rule of law is that a municipal corporation is bound to keep its streets and sidewalks in a safe condition for travel in

Streets and Sidewalks—Condition—Duty of City.

ordinary modes by night as well as by day, and if it fail to do so it is liable for damages for injuries sustained in consequence of such failure." See, also, Mayor, etc., of City of Milledgeville v. Cooley, 55 Ga. 17; Western & A. Ry. Co. v. City of Atlanta, 74 Ga. 774. In the Milam Case, cited above, Mr. Justice Lumpkin, in delivering the opinion of this court, said: "While, of course, in most American cities, water plugs, telegraph and telephone poles, trees, and other things are allowed upon the margins of sidewalks, and pedestrians, therefore, are not expected to use such portions of the same as are occupied by these obstructions, still there can be no doubt, under the rules of law now settled by repeated adjudications in this and other jurisdictions, that the city authorities must keep in a reasonably safe condition all parts of its sidewalks which are intended to be used by the public. It may often happen that in a particular locality a comparatively narrow portion of a sidewalk on either side or in the middle of it is much more generally used than other portions of the same; but this does not relieve the municipal authorities from liability for negligence in permitting dangerous obstructions to be continuously maintained in places upon sidewalks over which the public have a right to pass, merely because those places are not so much used as others."

Same—Wire across Street—Obstruction—Question for Jury.

4. We are not able to say that a wire such as was shown by the evidence, stretched along the margin of a sidewalk which is a part of a public street, would not be a dangerous obstruction, nor that it might not even constitute a nuisance. That this particular wire was a dangerous obstruction is shown not only by the injury which was inflicted on the plaintiff, but also by the additional proven fact that another child had previously been injured by running against it. After all, whether any given obstruction on or near a sidewalk is dangerous, and whether a failure to remove it would constitute negligence on the part of the city, are questions of fact, which the jury must determine. In the work of Mr. Jones, previously cited, he says in section 78: "Whether in any locality a traveled way was necessary, and whether the condition of the roadway outside of the traveled track was such as to render the road itself unsafe, would be for the jury to decide, upon a consideration of all the circumstances surrounding the case." The compilers of 15 Am. & Eng. Enc. Law (2d Ed.) 440, cite a number of cases to support the proposition that whether a highway is or is not defective is one of fact for the jury, acting under proper instructions from the court. To the same effect, see Tied. Mun. Corp. § 346, p. 695. In the case of City Council v. Hafers, 59 Ga. 151, this court ruled that whether the system of the city in regard to allowing cellars on its sidewalks in front of business houses was reasonably calculated to insure the safety of those who travel on them by day or night was a question of fact, and therefore for the jury; and in Dempsey

v. City of Rome, 94 Ga. 420, 20 S. E. 335, where the plaintiff was injured by getting his foot caught in a hole which had existed for two weeks or longer in a plank crossing, it was ruled that the question of the negligence of the authorities in leaving the crossing in that condition was one for submission to the jury. See, also, Enright v. City of Atlanta, 78 Ga. 288, and City of Atlanta v. Milam, supra.

5. It is also further urged as a ground of error that the charge of the judge did not fairly state the law as to a city's liability towards one using the street for the purpose of play, and, as it was shown by the evidence in this case that the plaintiff was using the street at the time of his injury for a playground, he cannot recover; the principle of law applicable being that, if one is injured while so using a street, the city is not liable unless the playing is merely incidental to his use of the way as a passenger. We do not understand this contention to be a correct statement of the law. The rule is thus stated by Mr. Jones in his work previously referred to (section 90): "The duty to keep the sidewalks reasonably safe is not confined, at common law, to travelers. * * * The general rule is that every person who uses a sidewalk for any purpose for which sidewalks are designed is within the obligation of the duty. * * * The common law does not draw a distinction between the exercise and play of young children, and, whether the child is using the street for exercise or play, he is entitled to his right of action if he is injured by the negligence of the corporation." The New England states and some others have by statute adopted a different rule as to the liability of a city for damages sustained by a child who is injured while playing on the streets, "but, even under those statutes, if the child is actually traveling along the highway the fact that incidentally he is engaged in play or amusement does not prevent recovery." 15 Am. & Eng. Enc. Law (2d Ed.) 464d, and authorities there cited. See, also, Gulline v. City of Lowell, 144 Mass. 491, 11 N. E. 723; Reed v. City of Madison (Wis.) 17 L. R. A. 734, 735, 53 N. W. 547, and cases cited. The trial judge, in effect, gave in charge the stricter rule of the New England states; but even under its application the jury determined the facts in favor of the plaintiff, practically finding that the use of the streets in this instance was not merely for play, but that the play was only incidental, and we think the evidence supports the verdict.

Same—Child Playing on Streets Incidentally—No Bar to Recovery.

6. It is also alleged that the judge erred in refusing to charge a written request in the following language: "Any one passing from the street to the sidewalk, or the reverse, at any point other than a crosswalk, has no reason to expect a safe passageway and must therefore do so at his own risk." The principle embodied in the request is not sound as a matter of law, when applied to unauthorized obstructions in a street,

Same—Pedestrian Crossing at Place Other Than Crosswalk.

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As a rule, a municipal corporation has no right or power to place any obstruction in a street, or permit the same to be done. On the contrary, it is its duty to prohibit it, and to remove any obstructions so placed. The same is true as to sidewalks, which are but parts of the street. The traveler has the right to use the street by passing across it at a point where there is no crosswalk, and in doing so he does assume a greater risk from passing vehicles and animals using the main thoroughfare than he does when passing over a crosswalk. Railway Co. v. Gibson, 97 Ga. 498, 499, 25 S. E. 484. But he does not, in doing so, assume any greater risk from obstructions other than those necessary for the use of some public utility, such as water plugs, telegraph and telephone poles, and the like. Even a telegraph or telephone wire placed so low on a sidewalk or street that a person using the street might come in contact with it would be an obstruction, and, if this be true as to one of these general conveniences erected for the use of the public, what can be said of the erection of a wire, having sharp points projecting from it, strung longitudinally along the sidewalk, within four feet or thereabouts from the ground, intended to serve no public purpose whatever? There was, we think, no error in refusing to charge as requested.

We find no error in the grounds of the motion not specifically dealt with, and, there being sufficient evidence to sustain the verdict, the judgment below is affirmed. All the justices concurring.

NOTES.

Wires and Ropes across Highways—Liability of Municipality.—In Barber *v.* Roxbury, 11 Allen (Mass.) 318, 320, it was held that a rope stretched across a highway from a derrick on one side to a stone on the other, both of which were without the limits of the highway, the rope being at the time in the use of a city marshal in search for stolen goods, is not a defect in the highway under the Massachusetts statute and the city was held not to be liable for injuries occasioned to travelers by such rope. In French *v.* Brunswick, 21 Me. 29, 38 Am. Dec. 250, and in Hayes *v.* Town of Hyde Park, 153 Mass. 514, 35 Am. & Eng. Corp. Cas. 543, 27 N. E. Rep. 522, towns were held liable for injuries caused in the first-named case by a rope, and in the latter by a wire extended across a public highway. See also, Chicago *v.* Fowler, 60 Ill. 322; Isham *v.* Post, 141 N. Y. 100, 38 Am. St. Rep. 766. See also, Arthur *v.* City of Charleston, 2 Mun. Corp. Cas. 326; Hayes *v.* Town of Hyde Park, 153 Mass. 514, 27 N. E. Rep. 522.

In Whittal *v.* New York, 64 N. Y. 5250, the facts were that plaintiff was injured by falling over a rope tied by a grocer from one awning post to another and it was held not error to charge that the city was liable for neglect to remove an obstruction in the street by a third person without regard to whether it was such as persons of reasonable prudence and foresight would deem dangerous.

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Defective Streets and Sidewalks—Province of Jury.—Although many of the cases upon the subject have failed to discuss directly the province of the judge and jury in respect to questions of whether various defects and obstacles in streets constitute actionable negligence on the part of the city, yet it will be found upon an examination of the numerous cases turning upon the character of such defects that the question of negligence has almost invariably been left to the jury. And wherever the courts have expressed themselves upon the point they have laid it down as a rule that the decision as to the safety of a street for public use as well as whether particular defects constitute actionable negligence is for the jury. Thus, in Saylor *v.* Montesano, 11 Wash. 328, the court said: "Ordinarily, the question of whether a street is in proper repair and safe for ordinary travel is a question of fact to be determined by the jury, and when so determined, their finding will not be disturbed, unless absolutely unsupported by the evidence." See also, the collection of cases in 15 Am. & Eng. Enc. Law (2d Ed.) 440. Again, in Forker *v.* Borough of Sandy Lake, 130 Pa. St. 122, 31 Am. & Eng. Corp. Cas. 61, the court says: "The length of this walk at the place of the accident is but 34 feet, and it is argued that for so short a space a good plank sidewalk, eight feet wide, is entirely safe and sufficient for the travel of so small a town. It is manifest at once that the question whether such a sidewalk, in such a town, is sufficiently safe for the travel passing over it, is a pure question of fact, to be determined exclusively by the jury, upon a consideration of all the circumstances affecting it. Of course, there is a difference in this respect between the villages and small country towns of the state and the cities and larger towns, in which the travel is so much greater. What would be negligence in the latter might be sufficient care in the former. As to all these matters the jury should be properly instructed, and then told that it is for them, under all the evidence in the case, to determine whether the sidewalk in question was reasonably safe for the travel passing over it, and that if it was not the defendant would be guilty of negligence, while if it was it would not be, and in the latter event the question of contributory negligence would not arise. But in the charge as it was delivered the question of the plaintiff's contributory negligence was the only one discussed, and the defendant's negligence was practically removed from consideration of the jury. In this there was error, and the first and second assignments are sustained." See also, Franke *v.* City of St. Louis, 38 Am. & Eng. Corp. Cas. 297.

In Arthur *v.* City of Charleston, 2 Mun. Corp. Cas. 326, it was held that the question of negligence on the part of the defendant city where it was sued by one who fell over a rope stretched across one of the sidewalks was for the jury. Likewise, in Hayes *v.* Town of Hyde Park, 153 Mass. 514, 27 N. E. Rep. 522, it was held that it was a question for the jury whether a telegraph wire which sloped down from a house to which it was fastened and lay across the highway, so permanently obstructed travel as to be a defect for which the town might be liable. See generally, Sawyer *v.* City of Newburyport, 32 N. E. Rep. 653; Smith *v.* City of Pella, 53 N. W. Rep. 226; Girard *v.* City of Kalamazoo, 92 Mich. 610, 42 Am. & Eng. Corp. Cas. 50, and *notes*; Foy *v.* City of Winston, 4 Mun. Corp. Cas. 391; City of Streator *v.* Crisman, 4 Mun. Corp. Cas. 225; Urtel

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v. City of Flint, 4 Mun. Corp. Cas. 227; Grayvill *v.* Whitaker, 85 Ill. 439; Congdon *v.* Norwich, 37 Conn. 418; Whitney *v.* Cumberland, 64 Me. 541; Williams *v.* Clinton, 28 Conn. 266; Mallory *v.* Walker, 77 Mich. 448; Craig *v.* Sedalia, 63 Mo. 417; Johnson *v.* Haverill, 35 N. H. 74; Downes *v.* Hopkinson, 67 N. H. 456; Howard *v.* Mendon, 117 Mass. 585; Augusta City Council *v.* Hofers, 59 Ga. 151.

In Gibson *v.* City of Huntington, 38 W. Va. 853, 45 Am. St. Ry. 853, the court lays down the law upon the subject as follows: "If the facts of a case are indisputable, and there can be no fair difference of opinion as to whether the inference of negligence should be drawn, the question becomes one of law alone, and the court may decide it, if appealed to for this purpose. But, even where the facts are not disputed, if there may be a fair difference of opinion as to whether the inference of negligence should be drawn, or as to whether the facts sustain the charge of negligence, the jury are the sole judges, and their verdict cannot be disturbed, although the court may be of the opinion that the facts do not sustain it."

PEDESTRIAN CROSSING STREET AT PLACE OTHER THAN CROSSWALK.

Rule Established by Weight of Authority.—The weight of authority is with the principal case upon the rule as laid down by it in the sixth headnote negativing the assumption of risk by the traveler who crosses a street at places other than a regular crosswalk.

Thus, in City of Denver *v.* Sherret, 1 Mun. Corp. Cas. 519, the court said: "The use of the public streets between crossings is not limited solely to animals and vehicles, but may be used by footmen, due caution being exercised."

And in Moebus *v.* Herrman, 108 N. Y. 349, 15 N. E. 415, the court held that a person on foot has a right to cross the street where he pleases, and the inquiry is whether under the circumstances in any given case he was exercising due caution.

In Lincoln *v.* Detroit, 101 Mich. 245, plaintiff was attempting to cross diagonally at an intersection of streets and fell into a man hole, defectively constructed. It was held that while it was not the city's duty to construct a smooth surface for travel at that point yet it was neither extraordinary nor negligent for pedestrians to cross the street at other points than the crosswalks, and it was for the jury to decide whether the place in question was reasonably safe. Approved in Baker *v.* Grand Rapids, 111 Mich. 447.

In Raymond *v.* City of Lowell, 6 Cush. (Mass.) 524, 53 Am. Dec. 61, the court in holding that a foot passenger has a right to cross a street at any point and is not restricted to the regular crosswalks, said: "In the case of Cotterill *v.* Starkey, 8 Car. & P. 691, it was held that a foot passenger has a right to cross the carriage road; and that a person driving a carriage along the road is liable to an action, if he do not take care so as to avoid driving against a foot passenger who is crossing the road. In the case of Boss *v.* Litton, 5 *Id.* 407, it was held that a foot passenger had a right to travel in the middle of the street. LORD DENMAN said: 'A man has a right to walk in the road if he pleases. It is a way for foot passengers as well as for carriages. But he had better not, especially at night, when carriages are passing along.' These cases relate to the rights of footpassengers, in reference to carriages,

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but they recognize the general right of foot passengers to use the carriage-way."

Contrary View.—On the other hand, in Dayton *v.* Taylor (Ohio), 3 Mun. Corp. Cas. 144, it was held that a pedestrian, who without necessity, and for his own pleasure and convenience departs from the sidewalks and street crossings, upon which he would have avoided the injury, and crosses a street intersection diagonally, and is injured by slipping into a catch basin which lay between the crossings, must be held to have assumed the risks which lay in the path which he thus chose. The facts in this case are nearly parallel with those of Lincoln *v.* Detroit, 101 Mich. 245, mentioned previously in this note and the decisions can scarcely be reconciled. In the Ohio case, however, there was very little evidence of negligence on the part of the city save as to the absence of light at the point where the injury occurred.

Again, in McNish *v.* Peekskill, 36 N. Y. Supp. 1022, in a decision which may be easily reconciled upon the facts with the weight of authority, it was held that one who upon a dark night turns to cross an unimportant street between bushes and trees at a place where she cannot see where she is stepping is guilty of contributory negligence and cannot recover for injuries received in falling into a furrow made the day before in grading the street.

Walking in Roadway.—Upon the similar question of the right of a foot traveler walking in the roadway the courts very generally agree in holding that by leaving the sidewalk the traveler is not necessarily negligent.

Thus, in Finnegan *v.* Sioux City (Iowa), 4 Mun. Corp. Cas. 413, it was held that a person has the right to walk upon the driveway of a city street for the purpose of putting a package in a vehicle; and if he is injured while doing so, by reason of a defect which rendered the driveway unsafe for such use, the city is liable. For a very similar case, see Heckson *v.* Eveson, 7 N. D. 173, 73 N. W. 427.

In Junction City *v.* Blades, 59 Kan. 774, 52 Pac. 444, the rule is laid down that a foot traveler need not confine himself to the sidewalks of a city, but, exercising due care to avoid the usual danger incident to the middle of the street, he may make use of any portion of the street he desires.

But, in O'Laughlin *v.* Dubuque, 42 Iowa 539, this privilege is qualified and it is held that if the pedestrian uses other portions of the street than the sidewalks without good cause he assumes the risks; but if the sidewalks or crossings are obstructed or in a defective condition he may walk elsewhere.

LIABILITY OF MUNICIPALITIES FOR INJURIES TO CHILDREN OCCASIONED BY DEFECTIVE CONDITION OF STREETS AND SIDEWALKS.

General Rule.—The law is correctly stated in Indianapolis *v.* Emmelman, 108 Ind. 530: "The liability of the city is precisely the same in case a child rightfully in a street sustains injury from a defect created therein by the city, as in case of an adult who is injured while free from fault from a like cause." This statement of the law would probably not be disputed in any jurisdiction. See also, Stinsin *v.* City of Gardiner, 42 Maine 248, 66 Am. Dec. 281.

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Same—Children Playing in Street.—In the absence of statutes limiting the city's liability to travelers only, the courts very generally hold that the fact that the child was playing in the street does not make its presence there unlawful or render the city less liable for injuries caused by negligent defects.

"That it is not unlawful, wrongful or negligent for children on the sidewalk to play, is a proposition which is too plain for comment." McCary *v.* Loomis, 63 N. Y. 104, 20 Am. St. Rep. 510.

"Whether it (a sidewalk) be passed over for business or for pleasure, or merely to gratify idle curiosity, we think the use is lawful. A child may lawfully be upon the sidewalk for pleasure only, that is to say for play, and the city owes the same duty to have the sidewalk in a reasonably safe state of repair in respect of it that it does in respect of those who are on the sidewalk passing to or returning from their places of business, or abode." City of Chicago *v.* Keefe, 114 Ill. 222, 11 Am. & Eng. Corp. Cas. 549, 55 Am. Rep. 860. In this case the child was rolling a hoop on the sidewalk when injured. See also in accord, Kerr *v.* Forgue, 54 Ill. 482, 5 Am. Rep. 146, distinguishing in the facts Chicago *v.* Starr, 42 Ill. 74; Kunkel *v.* Chicago, 37 Ill. App. 325.

In Indianapolis *v.* Emmelman, 108 Ind. 530, a child five years old, at play, fell into an excavation which had been made and negligently left unguarded by the city in constructing a bridge (it being known that children played there) in continuation of a street, and the city was held liable. See also, Mayhew *v.* Burns, 103 Ind. 328.

In Kuntz *v.* City of Troy, 104 N. Y. 344, 53 Am. Rep. 508, it was held that the court erred in nonsuiting the plaintiff in an action against the city, when the facts were that a child five years old was killed by a counter which had been placed on the sidewalk in such manner as to potentially impute negligence to the city and which was thrown down by deceased and three other children running against it in play. But see McLaughlin *v.* Phil., 142 Pa. 30, where it was held that a city is not liable for injury caused to a child by window screens, which the occupant of a building has placed on the sidewalk leaning against his building and falling upon her while she is on the sidewalk, though the screens have been left in that position each day for months.

In the recent Canadian case of Ricketts *v.* Marksdale, 31 Ont. 610, it was held that there could be recovery against a municipality for the death of an infant who was killed while playing on timbers in the street, which the city had negligently let remain there.

In Gibson *v.* City of Huntington, 33 W. Va. 177, 45 Am. St. Rep. 853, the court lays down the law emphatically to be that children playing in the street may be lawfully there and are entitled to protection from defective streets.

In McGuire *v.* Spence, 91 N. Y. 303, it was held that a judgment against defendant would not be set aside where a child of fourteen years of age, while playing on the sidewalk was injured by falling into an uncovered opening constructed by an abutting owner in the sidewalk. The words of the court were: "Nor does it change the result that she was playing upon the sidewalk instead of using it for the ordinary purposes of travel. Our attention is called to certain cases in other states as authority for the doctrine that only those using the

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streets for their appropriate and normal purposes are within the rule of protection. Blodgett *v.* City of Boston, 8 Allen 237; Stinson *v.* Gardiner, 42 Me. 248; McCarthy *v.* City of Portland, 67 *Id.* 167, 24 Am. Rep. 23. In these cases the actions were against municipal corporations under statutes which bound them to keep the streets safe and convenient for travelers, and a just construction of the written law furnished the limitation of the corporate duty. In this state we have held that the duty exists not merely as to travelers, but as to all persons lawfully in the streets, and have imposed upon a city a liability for negligence where the person injured was in no sense a traveler, but engaged in excavating the street under lawful permission, but for the benefit of a private corporation. Pehburg *v.* Mayor, January, 1883. This plaintiff was lawfully in the street. She had a right to be there, and while there not to be exposed to the possible dangers of an uncovered opening in the sidewalk. Nor does it matter that she was at play with other children. In McCary *v.* Loomis, 63 N. Y. 104, 20 Am. Rep. 510, we stated it as a proposition too plain for comment that it is not unlawful, wrong or negligent for children on the sidewalk to play." See also, Shippy *v.* Village Au Sable, 85 Mich. 280; Brennen *v.* St. Louis, 92 Mo. 482; Chicago *v.* Mayor, 18 Ill. 360, 68 Am. Dec. 583; Chicago *v.* Hessing, 83 Ill. 204, 25 Am. St. Rep. 378; Vicksburg *v.* McLain, 67 Miss. 4.

In Brennen *v.* St. Louis, 92 Mo. 482, the city was held liable for injuries suffered by a child while exercising in a defective street.

There Must Be Negligence on Part of Defendant.—But in Gavin *v.* City of Chicago, 97 Ill. 66, 37 Am. Rep. 99, it is held that while it is the duty of a municipal corporation to keep bridges within the corporate limits in a reasonably safe condition it is not its duty to so construct its streets and bridges that accidents are impossible to persons using them, and it is accordingly held that it is not the duty of such corporation, which maintains a swing bridge on one of its streets, to erect barriers or station watchmen for the protection of young children playing about the same. See also, Oil City Bridge Co. *v.* Jackson, 114 Pa. St. 321, 16 Am. & Eng. Corp. Cas. 123.

In Ganghan *v.* Philadelphia, 119 Pa. 503, 13 Atl. Rep. 300, it was held there could be no recovery for the death of a seven-year-old boy who was injured while amusing himself by climbing up and sliding down the post of an awning erected properly over a sidewalk.

In Donoho *v.* Vulcan Iron Works, 7 Mo. App. 447, affirmed in 75 Mo. 401, the doctrine is laid down in terms that are not dissimilar to those which might be used by a court ruling under a statute limiting the liability to travelers. In that case an eleven-year-old boy while on an errand for his mother stopped to watch, without participating himself, several boys at play in a sandbank which fell and injured him. The court said: "If the plaintiff had abandoned his errand for the time being, and was actually engaged with the other boys in excavating the bank for amusement when the accident occurred, there might be room for the application of the doctrine that the city was no guarantor of the personal safety of one thus misusing the public thoroughfare. But if he was merely pausing in his errand because his attention was attracted for a moment to the occupation of his playmates, there can be no

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fairness in asserting that in that moment he was not properly on the highway, or using it for the purposes of its creation."

STATUTES LIMITING LIABILITY TO TRAVELERS ONLY.

General Rule.—In Massachusetts and other New England states and in a few other jurisdictions the liability of municipalities for injuries occasioned by defective streets is entirely statutory, and the statutes for the most part limit the liability to injuries to travelers. This limitation among other important effects, makes it frequently a nice question whether a child under certain circumstances is a traveler within the meaning of the statute. It is almost universally held in these jurisdictions that a child merely playing in the streets is not a traveler but if he is actually traveling on the street the fact that he incidentally engages in play does not remove him from under the protection of the class.

Same—When Child Ceases to Be a Traveler.—Thus it was decided in Blodgett *v.* Boston, 8 Allen 237 (which is reaffirmed in Tighe *v.* Lowell, 119 Mass. 472), that a boy using the highway solely for the purpose of playing could not recover of the city for an injury caused by a defect in the way. But the court said: "We by no means intend to say that a child who receives an injury caused by a defect or want of repair in a road or street, while passing over or through it, would be barred of all remedy against a town merely because at the time of the occurrence of the accident he was also engaged in some childish sport or amusement. There would exist in such a case the important element that the person injured was actually traveling over the way. But this element is wholly wanting in the case at bar. We have here the naked case of an appropriation of a portion of a public street to a use entirely foreign to any design or intent to pass or repass over it for the purpose of travel within the meaning of the statute. It is to this precise case that we confine the expression of our opinion."

In Lyons *v.* Brookline, 119 Mass. 491, it was held that a child could not recover, who while sitting playing upon the sidewalk was injured, for he had ceased to be a traveler.

In Stinson *v.* City of Gardiner, 42 Me. 248, 66 Am. Dec. 280, it was held that a child using a highway as a play ground cannot recover for injuries received although such injuries were occasioned by a defect in the road.

In Reed *v.* Madison, 83 Wis. 171, 17 L. R. A. 733, it was held that the remedy under the Wisconsin statute is available only to those who are using the sidewalk or highway for purposes of travel. See also, Goeltz *v.* Ashland, 75 Wis. 642.

Same—When Child Is Still a Traveler Though Incidentally Engaged in Play or Exercise.—Some of the courts construing these statutes have gone far towards evading the harshness of the rule denying protection to children who are making a play ground of the streets while in all of the jurisdictions it is held that a child who is a *bona fide* traveler does not lose the protection incident to that character, by incidental play contemporaneously.

In Reed *v.* Madison, 83 Wis. 171, 17 L. R. A. 733, it was decided that under the Wisconsin statute a child did not cease to be a traveler

because while going to a certain place to meet playmates she is rolling a hoop on the sidewalk. See in accord, Strong *v.* Stevens Point, 62 Wis. 255.

In Hussey *v.* Ryan, 64 Md. 426, 54 Am. St. Rep. 772, it was held that a child who was injured by a fence falling upon her while she was on the sidewalk could recover though she was injured while she had stopped to look with childish curiosity at some workmen shingling a roof and would not have been hurt had she not stopped.

In Gulline *v.* Lowell, 144 Mass. 491, 59 Am. Rep. 102, it was held that a boy was under the protection due to travelers who while walking with his father on a plank footway upon a bridge slipped aside in play to clasp a post which formed a part of the bridge and fell through a hole in the planking.

In Hunt *v.* Salem, 121 Mass. 294, a boy, on his way home, crossed the street to look at toys in a shop window, and stood looking at them four or five minutes and was injured as he turned away to resume his walk. It was held that he could recover.

In Bliss *v.* South Hadley, 145 Mass. 91, 1 Am. Rep. 441, a child under two years of age was sent into the street for air and exercise in charge of its eight-year-old brother. It was held to be competent for the jury to find them to be travelers.

In Graham *v.* Boston, 156 Mass. 75, 30 N. E. Rep. 170, it was held that where several boys had been playing on their way home in a public street, and had stopped to rest, and one of them, while walking along before the others, came in contact with an electric wire which had been allowed to hang within a few feet of the street, and from which he received a severe shock, the fact that just before the injury he had been using the street for the purpose of play did not divest him of the character of a traveler.

This note does not include cases involving solely the question of contributory negligence of children nor cases bearing upon the liability for leaving exposed and unguarded places "attractive to children."

For collection of cases bearing upon "Imputed Negligence," see *notes* appended to Roanoke *v.* Shull, 2 Mun. Corp. Cas. 675 *et seq.*

REEDY

v.

ST. LOUIS BREWING ASS'N *et al.*

(*Supreme Court of Missouri, Division No. 1, March 29, 1901.*)

[61 S. W. Rep. 859.]

Ice on Street—Duty of City as to Leaking Gutters.*—Where plaintiff was injured by falling on an icy sidewalk in front of defendant brewing company's premises, the ice having formed from water from a leak in a

*See Hodges *v.* City of Waterloo, 4 Mun. Corp. Cas. 233; Circleville *v.* Sohn, 1 Mun. Corp. Cas. 51, and *notes*.

pipe extending across the top of the building, the defendant was not liable for the injuries because of a defect in the gutters and down spouts draining the roof of the building, as there was no duty on it to maintain and keep in good repair gutters and down spouts sufficient in size to carry off water from such a source.

Same—Duty of City to Remove in Reasonable Time.—Smooth and slippery ice covering a sidewalk for a space of 15 feet, which formed from water running off the roof of an abutting building on account of a leak in a water pipe thereon, is a dangerous obstacle, which the city is bound to remove within a reasonable time after notice, where there is no other ice or snow on the streets, since it was possible and practicable for the city to remove the same.

Same—Same—Notice—Erroneous Instructions.—Plaintiff was injured by falling on an icy sidewalk. The ice formed from water escaping from a leaking water pipe on the roof of an abutting building, early in the evening the night before the accident. The abutting property owner had covered the ice with malt sprouts to render it less dangerous, which remained on the ice all day until about 5 o'clock in the evening, when boys swept them off to skate on the ice. Plaintiff fell on the ice about two hours thereafter, and in an action against the city and the abutting owner for the injuries thus received, in which a change of venue had been taken, the jurors not being drawn from the same vicinage as the place of the accident, the jury were instructed that the defendant city was liable if it knew "by its proper officers having charge of and keeping its streets in repair, or by the exercise of ordinary care would have known," of the defective condition of the sidewalk, in time to have caused the ice to be removed before plaintiff was injured. *Held*, that such instruction was erroneous and prejudicial to defendant city, in that it left a great deal of inference to be drawn from the common knowledge which the jurors derived from their everyday experience as to the duties of proper city officers in regard to ascertaining within the time the condition of the walk, there being no evidence as to such duties.

Same—Not Necessary to Be a Veritable Obstruction.—In an action against a city for injuries received by falling on an icy sidewalk, where the evidence did not show that there was any other ice or snow in the city, it was error to charge on the theory that the city would be liable only in case the snow or ice was suffered to be piled up so as to create a veritable obstruction.

Appeal from circuit court, Gasconade county; Rudolph Hirzel, Judge.

Action by John Reedy against the St. Louis Brewing Association and another. From a judgment in favor of the plaintiff, defendants appeal. Reversed.

Kehr & Titman, B. Schnurmacher, Carl Unger, and Alex. Nicholson, for appellants.

A. R. Taylor and B. L. Mathews, for respondent.

Valliant, J. Plaintiff slipped and fell on ice on a sidewalk in one of the public streets of the defendant city, and suffered

serious injuries. This suit is to recover damages for those injuries. The defendants were sued as joint tort feasors. The joint injury is alleged to consist in neglecting to remove the ice from the sidewalk within a reasonable time after its existence was known, or would have been known, if reasonable care had been observed. The defendant the St. Louis Brewing Association is charged in the petition to have caused the ice to form by suffering water from its abutting premises to flow upon the sidewalk in freezing weather. The particular fact of negligence alleged against the brewing association is that the gutter on that defendant's building was in "defective condition"; "that, owing to the insufficiency of the spouts and gutters on said building, the water from the roof of said building overflowed upon the sidewalk of said street, where it was frozen, and became a dangerous obstruction to passage over said sidewalk. The defendants answered severally, denying the allegations of negligence, and pleaded that plaintiff was himself guilty of negligence that contributed to his injuries. It appeared from the evidence that the brewing association owned buildings at the southeast corner of Eighteenth street and Cass avenue, running south to a paved alley 20 feet wide. Next south of the alley is its storage house, which is about 40 feet high. The buildings north and south of the alley are connected by a bridge. On the building east of the storage house there was a water tank supplied by a pipe running across the bridge from north to south. It was a 2 or 2½ inch pipe, packed in a wooden box, extending over the roof of the storage house to the tank. This was a flat gravel roof 40 by 42 feet, with a copper gutter around it 4 inches wide at the bottom and 8 at the top, with a 4½-inch down spout of galvanized iron. As to the condition of the gutter, the testimony was conflicting. Two of plaintiff's witnesses said it sagged in the center, and one said it bent outward. Defendants' witnesses testified that it was in perfect condition, of best material and workmanship, set on brick the entire length of the wall, and could not sag; that the pitch of the roof was 18 inches from east to west, and the gutter and down spouts sufficient to carry off the rainwater that would accumulate on a roof of that size. Plaintiff lived in the same block just south of the brewery, and visited it almost every day. On the evening of November 30, 1896, between 7 and 7:30 o'clock, plaintiff went to the brewery, and informed the night watchman the water was running off the roof upon the sidewalk. The two went out together, and saw water running off the roof of the storage house. The night watchman went upon the roof, and there found that a leak had occurred in an elbow in the pipe leading to the tank. He went across the bridge to the mill house, and turned off the water. Then got a broom and swept the water off the sidewalk as well as he could. The superintendent of the brewery, who lived near, was notified, and he caused two men to spread malt sprouts on

the sidewalk where the water had fallen, with a view to prevent the ice becoming slippery, as it was then cold and freezing. There was no rain or snow. The weather was clear, dry, and cold. The water that had thus fallen from the roof of the storage house, or so much of it as had not been swept off, became frozen, and covered the sidewalk from the building line to the curb with a coating of ice. The ice was thicker near the building line and the curb than in the center. The location is a thickly-inhabited part of the city, and a great many people (the witnesses said thousands) passed over the place the day following, which was December 1st. About 5:30 p. m. that day a lot of boys were seen sweeping the malt sprouts from the ice to convert it into a skating place, and used it for that sport. About 7 o'clock that evening the plaintiff, while walking in the center of the sidewalk on this ice, slipped and fell, receiving serious injuries.

In its instructions, the court, after presenting in other respects the plaintiff's hypothesis of the case, including the formation of ice on the sidewalk, rough and uneven, so as to be a dangerous obstruction to persons passing, directed the jury to find for the plaintiff against both defendants if they found from the evidence that "the water was caused to so fall upon said sidewalk because the gutter of said building was out of repair and insufficient to carry the water from the roof of said building," "and if the brewing association did not use ordinary care in maintaining the gutters in that condition, and in suffering the ice to so remain on the sidewalk, and if the city knew, or by the use of ordinary care would have known, of the condition in time to remove it." Other instructions, upon like hypotheses (leaving out that of the city's duty), directed a verdict against the brewing association alone, to all of which exceptions were taken. It is unnecessary to here copy the instructions given for defendants, but it is sufficient to say that, in general, they directed a verdict for defendants, and each of them, unless the acts of negligence propounded in plaintiff's instructions were established by the proof, or if the plaintiff was himself negligent. For the city the instructions given carried the theory that the mere formation of ice or accumulation of snow on the sidewalk did not constitute a condition for which the city would be liable, but that the ice or snow would have to be so rough and uneven as to constitute an obstruction dangerous to persons using the sidewalk, while exercising ordinary care. Each defendant asked an instruction in the nature of a nonsuit, and, among others, instructions to the effect that ice which was smooth and slippery was not an obstruction, but, to become such, it must be rough and uneven in its surface. Those instructions were refused, and their refusal assigned for error. There was a verdict for $4,500 for plaintiff against both defendants, from which they appeal.

1. The first proposition advanced by the defendant brewing

association is that the petition makes no case of joint liability of the two defendants, but that as to the one the charge is negligence in suffering water to be discharged on the sidewalk in freezing weather, and as to the other allowing an obstruction to remain in the street for an unnecessary period after it was known, or would have been known by the use of proper care. It is argued upon the authority of Norton v. City of St. Louis, 97 Mo. 537, 11 S. W. 242; City of St. Louis v. Connecticut Mut. Life Ins. Co., 107 Mo. 92, 17 S. W. 637; Baustian v. Young, 152 Mo. 317, 53 S. W. 921, and other cases cited, that the abutting owner is not responsible for the condition of the sidewalk in his front, but that the duty to look after that is on the city alone. It does not, however, impair the doctrine laid down in those cases to say that an individual may become liable and jointly liable with the city for an unsafe condition of the sidewalk. This liability does not arise from the fact that he is owner of property abutting the sidewalk, but from the fact that he is instrumental in causing the condition, either by his willful act or negligent omission to perform a duty which the law imposes on him. If he is allowed an extraordinary use of the sidewalk for his private convenience, as, for example, to place in it a manhole for the reception of coal (Benjamin v. Railway Co., 133 Mo. 274, 34 S. W. 590), a water meter (Carvin v. City of St. Louis, 151 Mo. 334, 52 S. W. 210), or an excavation in close proximity to the sidewalk for a foundation for a new building (Wiggin v. City of St. Louis, 135 Mo. 558, 37 S. W. 528), the law imposes on him the exercise of reasonable care to guard the public from injury in such use. And it may be said that if the individual neglect to perform any duty that the law imposes on him in particular, and a dangerous condition of the sidewalk results, then a new duty on him in relation to that condition arises, and, of course, with greater force, it would be so if that condition was the result of his willful act.

Now, the petition in this case charges that the defendant brewing association maintained a defective gutter, and that the insufficiency of the spouts and gutters resulted in the discharge of water on the sidewalk, where it became frozen. If, therefore, it was the lawful duty of that defendant to maintain spouts and gutters sufficient to prevent a discharge of water on the sidewalk, its neglect to do so, and the resultant ice, imposed a duty on that defendant with reference to the ice which the law would not have imposed if the water had fallen from the clouds in the form of rain or snow. It is said by this defendant that there is no law requiring it to have gutters and down spouts on its buildings at all. There is no statute on the subject that we are aware of, but the principle of the common law is that, while the owner of adjoining property is not responsible for the natural flow of water across his land on to the land of his neighbor, yet he is liable if he collects it in a quantity by artificial means, and discharges it

in a flood on his neighbor's land, and that principle underlies that feature of this case. Water accumulated on a large roof, and directed to a single point, may cause a nuisance for which the owner of the house would be liable. If, therefore, the petition is to be construed into stating a case in which the brewing association was negligent in suffering water to be discharged on the sidewalk where it became frozen, and formed a dangerous condition (and that seems to have been the construction put upon it by both parties and the trial court), then it showed a condition of the sidewalk for the continuance of which for an unnecessary period both defendants would be liable, the joint wrong being the neglect to remove the obstruction.

2. But neither the petition nor evidence of plaintiff presents a theory of duty on the part of the brewing association to furnish gutters and down spouts to carry off water from a bursting pipe or a bursting tank. Conceding that the gutter sagged in the center, and that it bent outward (upon which point the testimony was conflicting), and that it was insufficient to carry off this water, it does not follow that the gutters and spouts were not sufficient to carry off the rain and melting snow that might fall upon the roof, and that is all that would naturally be inferred as their purpose. Suppose the pipe had burst at a point on the bridge over the alley, the water would probably have reached the sidewalk when it is crossed by the alley entrance without passing through the gutter; or suppose the tank had burst, what would the defective gutter have had to do with the flooded sidewalk? These ideas are suggested to point the fact that there is no relation, as far as the pleadings and proof show, between the office of the gutter and the water in the pipe. When this pipe burst, the water may have been forced in a body by the pressure on the mains to a given point, where the gutter was unable to impede it. But the gutter was not designed for that purpose. There is nothing in the case as made upon which the court could hold the brewing association liable for failure to furnish a gutter and down spouts sufficient to carry off water from a bursted pipe; and, even if the evidence had showed that the gutter was insufficient to hold rainwater, that would not have helped out the plaintiff's case, because the plaintiff's injuries did not result from a discharge of rainwater on the sidewalk. There is no suggestion, either in the pleadings or evidence, that there was any defect in the pipe that burst, or that the bursting was attributable in any degree to negligence of defendant brewing association. Since the water did not get on the sidewalk by reason of any willful act or neglect of duty on the part of this defendant, the condition of the sidewalk in consequence was the city's affair alone. The trial court should have given the brewing association's instruction for a nonsuit.

3. The law requires a city to keep its streets and sidewalks in reasonably safe condition for the purposes for which they

are designed, and holds it liable to one who, while properly using the street, suffers injury in consequence of its dangerous condition, provided the city had neglected a reasonable opportunity to remove the danger. The questions that we meet, therefore, on this branch of the case, are: Did the ice in this instance render the sidewalk dangerous? If so, did the city have a reasonable opportunity to remove the danger before the plaintiff suffered? Snow and ice on sidewalks have been the occasion of many injuries to persons, and the law books are full of instances where the duty of a municipality in respect to such conditions has been discussed. Running through all the cases to which our attention has been called on this subject, we find the general proposition that ice or snow upon a sidewalk or in a street is not to be classed with dangerous obstructions, such as a city is required to remove. It would be more accurate to say that it is a dangerous obstruction, but that it is excepted from the category of obstructions for which the city is liable upon the ground of the impracticability of requiring the city to remove it. There are, for example, in this city, many hundred of miles of sidewalks upon which snow falls and ice forms when the weather suits, and immediately upon its fall the snow is beaten down by the feet of thousands walking over it. To some extent the sidewalks and streets may be and are cleared of such obstruction, but to remove it entirely or to a degree that would render it not dangerous is impracticable, and therefore not embraced in the law's reasonable requirements. There is another reason for making snow or ice on the sidewalks and in the streets an exception to that dangerous condition for which a city is liable; that is, when that condition exists generally it is obvious, and every one is on his guard. Any pedestrian on the sidewalk or traveler in the street is warned by all his surroundings that ice and snow abound, and consequently danger of slipping and falling is to be apprehended at every step. The law is reasonable in this, as in all things. There is a collection of interesting cases in the briefs of the learned counsel on this subject which are authority for saying that when the ice or snow is merely smooth and slippery it is not such a dangerous condition as will render the city liable, but that that condition arises only when the ice or snow has been suffered to accumulate so as to form an uneven surface, making it dangerous to attempt to pass over. Stanton v. City of Springfield, 12 Allen, 566; Mason v. City of Boston, 14 Allen, 508; Stone v. Inhabitants of Hubbardston, 100 Mass. 49; Grossenack v. City of Milwaukee, 65 Wis. 31, 26 N. W. 182; Broberg v. City of Des Moines, 63 Iowa, 523, 19 N. W. 340; Taylor v. City of Yonkers, 105 N. Y. 202, 11 N. E. 642; Kaveny v. City of Troy, 108 N. Y. 571, 15 N. E. 726; Harrington v. City of Buffalo, 121 N. Y. 147, 24 N. E. 186; Chase v. City of Cleveland, 44 Ohio St., 505, 9 N. E. 225; Henkes v. City of Minneapolis, 42 Minn. 530, 44 N. W. 1026. The principle involved in those cases was pres-

ent in the minds of the court and counsel in the trial of this case, as was shown in the instructions given and in those asked and refused. But the circumstances of the case at bar do not bring it within the reason upon which the doctrine of those cases is founded.

In the first place, while the evidence showed that the ice was thicker at both edges of the sidewalk than it was in the center, yet it was not such a piling up of ice at either side as would convert it into a dangerous obstruction if it was not dangerous otherwise, and, besides, the plaintiff fell in the center, where the ice was smooth, and he fell because it was smooth and slippery. And, on the other hand, the reasons which except slippery ice on a sidewalk from the category of dangerous obstructions for which a city may be liable do not exist in this case. The water which was frozen here did not fall in rain or snow from the clouds, the city was not confronted with a thousand miles of ice-covered sidewalks to look after, nor were the people using the sidewalk at this point admonished by the general conditions surrounding them that ice was to be expected. The weather was dry, clear, and cold. There was ice at that point for a distance of about 15 feet, but not elsewhere. That the condition was dangerous is demonstrated by the plaintiff's fall; that the danger could have been removed with little labor or expense is beyond question. Therefore the city is not excused as it is when its powers are overcome by nature covering the face of the earth with ice and snow. In one of the cases above cited under this head (Henkes v. City of Minneapolis), there is an expression to the effect that no difference in principle is seen between a case of ice formed from rain or snow and that formed from water escaped from a hose of a fire engine. But the facts of that case do not mark it so distinctively as to make it an authority for that proposition, because, although water from the hose had entered into the case, yet it scarcely changed the conditions. The court said: "The sum of all the evidence is that it was, and for some time had been, cold winter weather, and all the sidewalks of the city were covered with ice to a certain extent, so that "if a man did not take care he was liable to slip and fall almost any place." In Chase v. City of Cleveland, supra, the Ohio court put the exemption of the city from liability on account of ice on the sidewalk upon the ground that it would be unreasonable to require the city to remove the obstruction. Said that court: "It is not unreasonable to assume that there were hundreds of similar places in the city of Cleveland at the time of the accident to plaintiff. To effectually provide against dangers from this source would require a large special force, involving enormous expense." We hold that where the sidewalk is in fact rendered dangerous, because of slippery ice formed from accidental or incidental discharge of water, such not being the prevalent condition of sidewalks at the time, it is the duty of the city to

cause the danger to be removed within a reasonable time after it has notice, or by the exercise of ordinary care would have discovered the condition.

This brings us to the second question under this head; that is, did the city neglect that duty? The city is not negligent unless it knew, or should have known, that the dangerous condition existed, and after such notice, actual or constructive, it was entitled to a reasonable time to remedy the fault. Baustian v. Young, 152 Mo. 317, 53 S. W. 921. The water had fallen upon the sidewalk about 24 hours before the accident. It seems to have been frozen, or some of it, almost immediately, and the brewery people covered the surface with malt sprouts, with a view to rendering it less dangerous, and these remained until about an hour and a half before the plaintiff fell. During the day it was said thousands of people passed over it in safety. It was about nightfall when the boys swept the malt sprouts off, and made a skating place of it. It was after dark when the plaintiff fell. The only evidence of notice to the city was contained in those circumstances. The instruction on this point was: "And if the jury find from the evidence that the city of St. Louis, by its proper officers having charge of keeping its streets in repair, knew, or by the exercise of ordinary care would have known, of said defective conditions of said sidewalk in time, by the exercise of ordinary care, to have caused said ice to be removed before plaintiff's injury, and neglected to do so." The question of notice in such case is one of fact, and where it is to be inferred from circumstances it depends upon those peculiar to the case. No definite rule can be laid down, either as to duration or conditions. Franke v. City of St. Louis, 110 Mo. 516, 19 S. W. 938. We cannot say that the circumstances in this case did not justify the court in submitting that question to the jury, but in submitting it the court left a great deal of inference to be drawn by the aid of that common knowledge which jurors derive from their every day experience. While that is a source of information which the law under certain conditions authorizes a jury to draw upon, yet because of its uncertainty it should be resorted to with caution. In this case we must remember the jury was not drawn from the vicinage of the accident, nor was it composed of men familiar with the duties of the city officers. The cause had been taken by change of venue to Gasconade county, and it was tried by a jury of strangers to the scene of action. Therefore, when the court gave them the instruction that required them to consider the care that would be exercised by the city's "proper officers having charge of keeping its streets in repair," it left them very much to conjecture. If plaintiff relied upon an inference of notice derived from the ordinary duties of the city officers, he should have furnished this jury some evidence on that point. The question was confused before the jury with ques-

tions relating to the liability of the brewing association that should not have been submitted. This was doubtless to the city's prejudice.

If the dangerous condition was to be reckoned from the time the boys swept the covering of malt sprouts off the ice, in the absence of proof that the city had actual notice, the court might, with propriety, have refused to submit to the jury the question of the city's constructive notice, depending, as it did, on an inference to be drawn from the length of time the condition had existed, because the plaintiff's fall occurred within less than two hours after the boys had swept off the malt sprouts, and it was about dusk when that was done. But it cannot be assumed conclusively, as a matter of law, that the condition was safe until the boys did the mischief. The ice had been there 24 hours, which was long enough to have, at least raised a question of constructive notice, and it could have been removed entirely in a very short while with trifling expense. Whether seeing that the ice was covered with malt sprouts was all that the situation reasonably demanded, and all that could have been reasonably expected, of the city, with the ordinary means at its hands, was a question of fact, and one which the jury was possibly better equipped, with common knowledge of things, to try, than they were the question relating to the duties of the city's "officers having charge of keeping its streets in repair." The case was tried on a wrong theory. The instructions were fashioned on those decisions above cited, which related to a condition of ice and snow all over the city rendering it practically beyond the city's means to remove, and holding the city liable only in case the ice or snow is suffered to be piled up so as to create a veritable obstruction to climb over. The jury were told that if they found that condition they should find for the plaintiff, and the jury so found, although there was no evidence of such a condition. There was evidence, as we have seen, tending to show that the sidewalk for a distance of about 15 feet was covered with smooth, slippery ice, which rendered it dangerous, and that it was altogether practicable to remove the danger, and that the city would, by the use of ordinary care, have known of the condition in time to have removed the ice or obviated the danger. The case, as between the plaintiff and the city, should have been given to the jury with appropriate instructions on that theory. There was no case at all made against the brewing association. The judgment is reversed, and the cause remanded to the Gasconade circuit court, to be retried according to the views herein expressed. All concur, except Marshall, J., absent.

PRAHL

v.

TOWN OF WAUPACA.

(*Supreme Court of Wisconsin, Feb. 26, 1901.*)

[85 N. W. Rep. 350.]

Defective Highways — Evidence—Sufficiency.— Plaintiff was injured by being thrown from her buggy, which ran off a culvert 18 inches high, with abrupt embankments, when her horse shied at some drain pipes which had been left near the road by the town authorities. The road was very narrow and smooth, and the culvert was 11 feet wide, and had no guard rail. The usual traveled track was about 1½ feet from the south end of the culvert. *Held* to sustain a finding that the road was unsafe for public travel.

Same—Same—Condition after Repairs.—In an action for an injury received on a defective highway, evidence as to the measurements of the highway, made a year after the accident, was properly rejected, where changes had been made in the same after the accident.

Appeal from circuit court, Waupaca county; Charles M. Webb, Judge.

Action by Ida Prahl against the town of Waupaca. From a judgment in favor of the plaintiff, the defendant appeals. Affirmed.

The purpose of this action is to recover damages for injuries sustained by the plaintiff upon an alleged defective highway in the defendant town. The accident is alleged to have occurred by reason of plaintiff's horse becoming momentarily frightened at some drain pipes left in the highway near the traveled track. The jury, by a special verdict, found that the accident occurred at a culvert on a turnpike 11 feet wide and 18 inches high, with abrupt sides. They also found that the drain pipes were located on the north side of the road, a rod or thereabouts east of the culvert. The plaintiff's horse became frightened at the pipes, and while momentarily beyond control ran the buggy off the culvert, and caused the accident. By the tenth and eleventh questions and answers, the jury found that the highway at the place of the accident was in a defective and unsafe condition for public travel, which was the proximate cause of plaintiff's injuries. Other facts not material to the questions raised were found. Damages were fixed at $400. Plaintiff moved for judgment, and defendant to set aside the answer to question 2, regarding the width of the turnpike, changing it from 11 to 12 feet, and also asked the court to disregard answers to questions 10 and 11, and for

judgment for defendant. Plaintiff's motion for judgment was granted, and defendant appeals. The questions raised for consideration are that the court rejected proper evidence offered by defendant; that the court erred in not setting aside the answer to the second question; and that a verdict should have been directed for defendant on the ground that the evidence did not show the highway was defective.

Connell, Hart, Cate, Sanborn, Lamoreux & Park, for appellant.

F. J. Feeney (James H. Feeney, of counsel), for appellee.

Bardeen, J. The main question litigated in the trial court, and the one urged with greatest vigor on this appeal, is that the highway was not shown to be in such a state of insufficiency or want of repair as to render defendant liable for plaintiff's accident. The facts regarding the exact condition of the highway were in sharp dispute. The accident occurred as a culvert in a narrow turnkpike, in a depression between two hills. The testimony regarding the width of the culvert and the height of the turnpike was conflicting. The jury found the culvert was 11 feet wide, and the turnpike was 18 inches high, and with abrupt banks. There is evidence to support these conclusions, and they must stand as verities in the case. The plaintiff was traveling west. Just before reaching the culvert the horse shied at some drain pipes left in the highway by the town authorities on the north side of the turnpike, and the buggy ran off the south end of the culvert, and plaintiff was thrown out and injured. The place was without guard. The face of the turnpike was smooth. The usual traveled track was about 1½ feet from the south end of the culvert. The jury found, under proper instructions, that the road was insufficient and unsafe for public travel. That question is always one for the jury, unless the conditions and circumstances are so clear and convincing as to leave no room for reasonable controversy. If, in the exercise of reason and with impartial judgment, a jury has found the highway to be insufficient, their finding must stand, unless we can say that the evidence, and the legitimate inferences therefrom, are so clear and decisive that no reasonable or unbiased man would have reached that conclusion. The rule is akin to that applied in cases of contributory negligence, of which there are many in the books. See Powell v. Steel Co., 98 Wis. 35, 73 N. W. 573. When the condition shown is such that different minds may reasonably draw different inferences and arrive at different conclusions, the jury, and not the court, must make the ultimate determination. It must be confessed that this case is very close to the border line. At the same time, we are not convinced that we ought to say that the highway was reasonably safe, as a matter of law. When we come to consider the width and height of the turnpike, and the surrounding conditions referred to, there is, at least, some room to say that it

was not reasonably adequate or sufficient for public travel. The jury and the trial court have said so, and the inferences against it are not so clear and strong that we feel justified in overturning that conclusion. Gorr v. Mittlestaedt, 96 Wis. 296, 71 N. W. 656. See Chappell v. Town of Oregon, 36 Wis. 145; Hein v. Village of Fairchild, 87 Wis. 258, 58 N. W. 413.

The defendant sought to introduce testimony of measurements made by a witness a year or more after the accident. The evidence is undisputed that changes in the turnpike had been made after the accident, and before the measurements were made, to such an extent as to leave no reasonable basis therefor. The rejection of such evidence was fully justified. The judgment is affirmed.

KEHOE

v.

CITY OF PHILADELPHIA.

(*Supreme Court of Pennsylvania, April 1, 1901.*)

[40 Atl. Rep. 679.]

Municipal Corporations—Negligent Maintenance of Street—Damages.—An action by a property owner against the city for damages caused by water accumulating in holes in the street and percolating into plaintiff's cellar after the grade of the street had been changed was not barred by the recovery which the plaintiff had for the damages occasioned by the change of grade.

Appeal from court of common pleas, Philadelphia county.

Action by Luke Kehoe against the city of Philadelphia. From a judgment of nonsuit, plaintiff appeals. Reversed.

J. Washington Logue and James E. Gorman for appellant.

Howard A. Davis and John L. Kinsey, for appellee.

Brown, J. The appellant brought suit against the city of Philadelphia to recover damages for injuries resulting to his property at the corner of Almond and Huntingdon streets from the alleged negligence of the appellee in connection with its control and supervision of the former street. The appeal is from a judgment of nonsuit, and it is to be regretted that the court below gave no reason for entering it or for refusing to take it off. Some time before the injuries complained of were sustained, the grade of Almond street had been changed, and, for the injury done to the property of appellant by the change, damages were assessed and paid to him in the statutory proceeding instituted for their recovery. The theory of the defense, as presented to us, is that there can be no recov-

ery in the present suit, because it has been brought for damages sustained, or likely to have been sustained, by the change of the grade of the street, for which compensation has already been made in the only proceeding that could have been instituted for them; and this view, we assume, in the absence of any reason assigned for withdrawing the case from the jury, must have been adopted by the court below. For any injury which resulted, or was likely to result, to his property from the change in the grade of the street, the plaintiff, of course, cannot now recover; and, if his present suit be for injuries so sustained, the nonsuit cannot be disturbed. But, though the appellee, for the purpose of its defense, contends that he has so sued it, the statement of his cause of action, sustained by proof, is otherwise. Upon it he has a right to ask for judgment, and the appellee cannot be heard in support of this judgment against him on a theory which overlooks it, and ignores his proofs. In the statement of his claim, it is true, he refers to the change in the grade of the street, but the ground of his complaint, as distinctly set forth, is that, after the grade had been actually changed, the appellee, in disregard of its duty, maintained the street in so negligent and improper a manner as to cause the injuries to his property. The proof is ample that for many months after the grade had been changed the street was improperly and negligently maintained by the city, having been full of holes containing water, which the appellant contends percolated into his cellar, and caused the special and serious injuries to his property, as set forth in his statement. It is most manifest that the case, as presented, should have gone to the jury, before whom the theory of the appellee might have availed as a matter of defense, if supported by proper proof. The judgment is reversed, and a procedendo awarded.

DRISCOLL

v.

CITY OF ANSONIA.

(*Supreme Court of Errors of Connecticut, Dec. 18, 1900.*)

[47 Atl. Rep. 718.]

Defective Sidewalk—Ice—Negligence of City—Instructions.*—In an action against a city for injuries sustained by slipping on a sidewalk, an instruction authorizing recovery if the injury was caused by ice, which had formed on the day of the accident, because the sidewalk was improperly constructed, cannot be given, where it was not averred that the sidewalk was not properly constructed, but the negligence charged

*See Reedy *v.* St. Louis Brewing Ass'n, *ante* p. 573.

was the city's failure to remove the ice, or cover it so as to prevent slipping.

Same—Same—Evidence—Opinion.—In an action against a city for injuries occasioned by slipping on a sidewalk, a witness cannot give an opinion, based on plaintiff's mental condition prior to the accident, where he had no knowledge of it, and no proof of it had been received.

Same—Same—Same—Cross-Examination.—In an action to recover for injuries, a witness, having testified that plaintiff's mental condition since the accident was impaired, may be cross-examined as to having seen her intoxicated.

Same—Same—Same—Harmless Error.—The improper examination of a witness as to the extent of plaintiff's injuries is harmless error where the jury found she was not entitled to recover any damages, though it was conceded she had been injured.

Same—Same—Same.—A witness who has testified that he had talked to no one about the case may be cross-examined as to whether he knew how he came to be summoned.

Same—Same—Same—Re-Examination.—In an action for injuries sustained by falling on an icy sidewalk, a witness cannot be re-examined as to the condition of the street, where he has testified in reference thereto on direct examination, and the cross-examination was not such as to require a re-examination.

Same—Same—Same.—In an action for injuries sustained by falling on an icy sidewalk, a witness may testify as to the presence of ice in the middle of the street and on other streets, and when such ice formed, in support of an allegation by defendant that there was an ice storm on the day of the accident.

Appeal from superior court, New Haven county; John M. Thayer, Judge.

Action by Lucy Driscoll against the city of Ansonia for injuries sustained by slipping on an icy sidewalk. From a judgment for defendant, plaintiff appeals. Affirmed.

The plaintiff claimed to have proved that the accident occurred before 4 o'clock on the afternoon of December 31, 1897, in front of No. 55 Jersey street, Ansonia; that the ice upon which she slipped had existed at this place for several days, and that no ashes or other substance had been placed upon it to prevent people from slipping upon it; that the sidewalk was not curbed or graded, but was nearly on a level with the rest of the street; and that there was no gutter between that part of the street used by foot passengers and that used by vehicles, and that water would stand upon the sidewalk, and freeze there. The defendant offered no evidence to disprove that the plaintiff slipped and fell at the time and place claimed, and that she received injuries, nor as to the claimed condition of the sidewalk with respect to its not having been curbed or graded, and with respect to water collecting and freezing there at times; but the defendant claimed to have proved that prior to the day of the accident the sidewalk was in a safe condition, and that at the time of the

accident there was no ice there, formed from standing water upon the sidewalk, but that on that day an ice storm prevailed in Ansonia, covering the entire surface of the ground with ice, and rendering all the streets and sidewalks so slippery as to be unsafe, and that this storm was prevailing when the plaintiff was injured. Other facts are sufficiently stated in the opinion. The charge to the jury, the refusal to charge as requested, and rulings of the court upon questions of evidence are the reasons of appeal assigned.

Charles S. Hamilton, for appellant.

Edwin B. Gager, for appellee.

Hall, J. (after stating the facts). The court properly refused to instruct the jury, as requested by the plaintiff, that the city would be liable for an injury caused by ice upon the sidewalk which had formed "even on the day of the accident, and at any time before the accident," if the jury found that it had so formed because the sidewalk was improperly constructed, or not properly drained, or because of the want of a gutter, or the condition of the gutter. The complaint does not allege any such negligence upon the part of the defendant as the request implies. It is not averred that the sidewalk was not properly constructed, or not properly drained, or that the gutter had become so clogged as to prevent the flow of water, or as to cause it to flow over the sidewalk. The allegations of the complaint are that the highway and sidewalk "were defective, out of repair, and unsafe for travel, especially in and upon said sidewalk * * * in front of No. 55 Jersey street, in that said sidewalk was covered with ice and snow"; that "said defective and unsafe condition of said highway and sidewalk * * * had existed for the period of six days or more, and the defendant well knew of said unsafe condition, or by due diligence or ordinary care could have discovered and remedied the same, * * * and the defendant negligently allowed said sidewalk and street to remain in the aforesaid condition." It is also alleged that the defendant failed to have ashes or other substance sprinkled upon the ice. The negligence here charged is the failure of the city to either cause the ice to be removed, or to be covered with some substance which would render it less slippery. It is unnecessary to discuss the question of whether a city would be liable for an injury caused by ice, with a knowledge of the existence of which upon the sidewalk it was not chargeable, but the formation of which at that place had been caused by the negligent failure of the city to curb the sidewalk, or to properly construct a gutter, since the complaint presents no such case. The case of Gaylord v. City of New Britain, 58 Conn. 398, 20 Atl. 365, 8 L. R. A. 752, cited by the plaintiff, is not applicable. There it appeared that the ice had formed upon the sidewalk because of the negligence of the city in failing to keep the

gutter properly cleared, and it was considered that such negligence was sufficiently alleged by the averment in the complaint in that case that the snow and ice "were allowed to accumulate by reason of the negligence of the defendant in caring for the sidewalk and gutter contiguous thereto, and also by reason of the refusal of the defendant to properly care for the same, though often requested."

The numerous reasons of appeal based upon rulings upon questions of evidence require but a brief discussion. The plaintiff's witness Dr. Goldstein could not properly have been asked to give an opinion based upon the mental condition of the plaintiff prior to the accident, of which he had no knowledge, and of which there had been no proof. But the rulings of the court upon his testimony could not have harmed the plaintiff, since it related only to the extent of her injuries; and the jury found she was not entitled to recover any damage, although it was conceded that she had suffered some injury. It was within the discretion of the court to permit the inquiries by defendant's counsel upon cross-examination of the witness Driscoll as to his having caused this suit to be brought, as to having seen the plaintiff intoxicated (he having testified upon the direct that her mental condition since the accident had been impaired), and as to the condition of other streets than the one in question; and of the witness Margaret Farrell as to the weather on the day following the accident; and of Mr. Tarr as to whether, in his opinion, rain falling in Ansonia would freeze upon the ground on the day in question, he having testified that, in his opinion, there would be no perceptible difference between the temperature in New Haven and Ansonia; and of the witness Brennan as to whether he knew how he came to be summoned, he having testified that he had talked to no one about the case; and of Mary Broderick as to the condition of the streets over which she passed when she noticed the condition of the sidewalk in question; and of the witness O'Brien as to whether he remembered seeing ice on the sidewalk on any other day than that as to which he had testified; and of Margaret Kennaugh as to the condition of the gutter in other places than that of the accident, as to its condition at which place she had testified. The questions asked by plaintiff's counsel upon redirect examination of the witness Brennan with reference to the condition of the street in question, and of Mary Broderick as to the condition of this street as compared with others which she testified she had observed, and as to how many times she passed by the sidewalk in question were properly excluded upon the ground that the witnesses had testified upon these subjects in the direct examination, and that the plaintiff was not entitled to re-examine the witnesses upon them by reason of any inquiries upon the cross-examinations. The inquiry of the witness Mary Broderick upon redirect examination as to what day she understood to have been referred to by a previous question by

defendant's counsel was properly excluded as containing an unwarranted statement by plaintiff's counsel that three different days had been mentioned. The questions asked defendant's witnesses Kirkham, Stilson, Tackash, and Barton as to the presence of ice in the middle of the street and upon other streets, and when such ice formed, were clearly admissible to prove that there was an ice storm on the day in question, as claimed by defendant. The testimony of Mr. Tarr, as a witness for defendant, that ice might have formed on the day in question from rain falling in Ansonia, although the temperature upon the top of the Insurance Building in New Haven, as he had before testified, was not lower than 34 degrees, was admissible as modifying the effect of his previous statement. Other exceptions require no discussion. There is no error. The other judges concurred.

CITY OF NEW WHATCOM

v.

FAIRHAVEN LAND CO.

(*Supreme Court of Washington, April 8, 1901.*)

[64 Pac. Rep. 735.]

Public Water Supply—Diversion by Municipality—Rights of Riparian Owner.*—A city which has become a riparian owner on a navigable lake and on its nonnavigable natural outlet has no right to divert the water of the lake for municipal purposes, and thus lessen the natural flowage of the water in such outlet, to the injury of a lower riparian owner and prior proprietor, without compensating him therefor.

Appeal from superior court, Whatcom county; J. P. Houser, Judge.

Action by the Fairhaven Land Company against the city of New Whatcom and the Bellingham Bay Water Company. From a judgment for plaintiff, defendant city appeals. Modified.

C. H. Hurlbut, T. E. Cade, and O. B. Barbo, for appellant.

Kerr & McCode, for respondent.

White, J. This action was originally instituted in the district court of the territory of Washington on the 8th day of August, 1889, by the Fairhaven Land Company, as plaintiff, against the Bellingham Bay Water Company, as defendant. The object of the action was to restrain and enjoin the Bellingham Bay Water Company, as a private corporation engaged

*See 18 Am. & Eng. Enc. Law (2nd Ed.) 135.

in the business of supplying the inhabitants of the town of Whatcom with water for general domestic and municipal use, from diverting the waters of Whatcom creek from its natural bed for that purpose. Whatcom creek is the only outlet of Lake Whatcom, and flows from said lake, which is situated about three miles to the southeastward of its outlet, in a fixed and well-defined channel, and has a fall from the lake of 318 feet, and is not in any sense a navigable stream. Lake Whatcom is the source of Whatcom creek, and is a large, navigable, fresh-water lake, with an area of about 7½ miles, or about 5,000 acres, and is a meandered lake. Whatcom creek empties into Bellingham Bay, a part of Puget Sound. In the descent of the creek to Bellingham Bay there are a series of falls, the last of which is about 25 feet in height, and the bottom of which is on a level with the tidal waters of Bellingham Bay. Ths last waterfall is immediately below a milldam used by the plaintiff in propelling a sawmill. There is a constant flow of water through the channel of the creek, which varies with the seasons. The capacity of the mill is about 75,000 feet of lumber per day. The natural flowage of the creek, undiminished by any diversion, is insufficient during the dry season of each year to operate the mill all the time. During the rainy season the flow of water through the creek aggregates about 100,000,000 of gallons per day, and during the dry season the average flowage is from 5,000,000 to 8,000,000 gallons per day. To operate the sawmill and the water wheel connected therewith, about 2,500,000 gallons per hour is required. In 1853 one Russell V. Peabody entered, under what is known as the "Donation Act," a part of the N. W. ¼ of the S. W. ¼ of section 30, township 38 N., of range 3 E. The plaintiff's mill is situated on a tract of land at the mouth of Whatcom creek, which is a part of the Peabody donation claim. The plaintiff is the owner of the lands at the mouth of the creek, and is the lowest riparian owner thereon, and its lands include the bed of the creek for a distance of about one-half mile upward from where the creek empties into Bellingham Bay. In the year 1854 Peabody and others associated with him erected on the tract now owned by the plaintiff a sawmill, and operated it by water power from Whatcom creek until 1874, when the mill was burned down. In 1882 or 1883 the mill, owned by the plaintiff at the time this action was commenced, was built on plaintiff's land about 50 yards below the old mill site; the office of the new mill being about where the old mill stood. By mesne conveyances from the Peabody heirs and Peabody's associates and their grantees on the 8th day of May, 1889, the plaintiff became the owner of said mill and mill site, and has been the owner ever since. The mill built in 1882 is also propelled by water from Whatcom creek. Whatcom creek flows through the Peabody donation claim and said mill tract. Subsequent to the institution of this action the Bellingham Bay Water Company, for the purpose of supplying the people

of New Whatcom with water for domestic and municipal purposes, laid its water pipes and mains upon the streets of Whatcom, and ran its mains up said Whatcom creek to a point about one-half mile from Lake Whatcom, and above the mill and lands of the plaintiff, and there connected its intake pipes and mains with the channel of said creek, and diverted therefrom the water supply for said city of New Whatcom. The present population of New Whatcom is about 7,000, and it is one of the growing and important cities of Puget Sound. In 1893, and at the time the Bellingham Bay Water Company's intake pipes were connected with and were in the channel of Whatcom creek, the city of New Whatcom purchased said water system from said water company; and thereafter the city of New Whatcom extended the water mains from where the intake pipes were located in said creek to and within Lake Whatcom proper, and located the intake pipes, which were 24 inches in diameter, about one-quarter of a mile from the outlet of the lake, the head of Whatcom creek, placing such intake pipes about 6 feet below the bed of the creek at its source in the lake, and ever since has maintained said water system, and since such extension of the mains the water supply of New Whatcom has been taken directly from Lake Whatcom, and from no other source whatever. Said lake is the only practical source of water supply for the city of New Whatcom, and each year the necessities of the public and of the inhabitants of the city for supply of water is becoming more important and exacting. The city of New Whatcom has also entered into various contracts and leases with various of its citizens and inhabitants, by which it agreed to furnish and is furnishing such parties, through its water mains, water from Lake Whatcom for power purposes, to enable such parties to operate mills, printing presses, feed mills, electric light plants, and various other machinery, and to supply docks, steamers, coal bunkers, etc. The water is also used by the city in operating public fountains and for public buildings, and in flushing sewers, etc. After New Whatcom purchased said system an amended complaint was filed in this action, and the city of New Whatcom was made a party defendant, and the action was discontinued against the Bellingham Bay Water Company, and the city of New Whatcom was substituted for the Bellingham Bay Water Company as the sole defendant. Neither the Bellingham Bay Water Company nor the city of New Whatcom at any time instituted any action to condemn, nor have they at any time condemned, plaintiff's property, nor have they taken any action to secure the right to divert the waters of said Whatcom creek or of said Lake Whatcom for public or private use or for any other purpose, nor have they in any manner settled or attempted to settle or adjust any damages that plaintiff has or may suffer by reason of the diversion of said water. The Bellingham Bay Water Company, by lease or

otherwise, was the riparian owner of the bed of said creek near the source thereof above the lands and mill site of the plaintiff at the time it put in its water system, and continued so up to the date of the sale of its system to New Whatcom, and the city of New Whatcom succeeded to whatever rights the water company had as such riparian owner; and the water company was a riparian owner on said creek above plaintiff prior to the date of the plaintiff's purchase of the mill and mill tract, and that fact was known to the plaintiff when it purchased. The city of New Whatcom has become the successor of the water company in supplying its inhabitants with water, and the value and use of the water system depend almost wholly upon a source of supply from said lake. If the supply was shut off the entire plant would be rendered valueless, and the people of the city would be greatly injured, and the public health might be endangered. The city of New Whatcom is situated on both sides of the creek, the full length of the creek from its source, taking in a part of Lake Whatcom and to its outlet. Streets and alleys are located and run across, parallel to, and upon the banks and bed of the creek; and the city of New Whatcom is the owner of property on the shores of the lake and in the bed of the creek at its source, and is a riparian owner on the lake and creek. By constructing a dam at the head of the creek at the foot of the lake the surplus water of the lake during the winter or wet seasons can be stored or retained until the dry weather approaches, and can be used during the summer to keep up and maintain the full natural flowage of the creek during the entire season. It is manifest from the evidence and findings in the case that by reason of the intake pipes of the water system being laid in Lake Whatcom, and the water drawn off thereby, the natural flowage of Whatcom creek is greatly diminished, and that by reason thereof there is not sufficient water at certain seasons of the year to operate the plaintiff's mill as the plaintiff might operate it but for the diversion of the water through the intake pipes of the defendant. The court below held that the diversion of any of the waters from Lake Whatcom, under the water system of the defendant, for the purpose of supplying water and power to the various light plants, wood yards, printing offices, etc., was in violation of the rights of the plaintiff, and that the plaintiff being the lowest riparian owner on the creek, and having appropriated the flowage thereof for mill purposes long prior to the attempted diversion of any of the waters of said creek, or of Lake Whatcom, the source of said creek, by the defendant or the water company, such diversion by the defendant was in violation of the rights of the plaintiff; and the court gave to the plaintiff a perpetual injunction against the city of New Whatcom, enjoining and restraining it from diverting any of the waters of said creek, or the waters of said lake, the source of said creek, for any purpose whatever, until such time as the said city should compensate the plaintiff for

any damages accruing to it by reason of such diversion. From this decree the city appeals.

The principal contention of the appellant is that the state, under article 17, § 1, of the constitution, is the sole and absolute owner of the bed, the shore to high-water mark, and the waters of Lake Whatcom; that the state can use or divert, or authorize the use or diversion of, the waters in the lake for any public purpose; that to supply the inhabitants of a city with water is a public purpose, and is a paramount necessity superior to every other use; that the state has authorized such use, and under such authorization the appellant is using the waters of the lake; and that the respondent has no interest in the waters of the lake.

The title to lands under tide waters in the sea, arms, and inlets thereof, and in tidal rivers, within the realm of England, was by the common law deemed to be vested in the king, as a public trust, to subserve and protect the public right to use them as a common highway for commerce, trade, and intercourse. The king, by virtue of his proprietary interest, could grant the soil so that it should become private property; but his grant was subject to the paramount right of the public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right. Upon the American Revolution the title and dominion of the tide waters, and of the lands under them, vested in the several states of the Union within their respective borders, subject to the rights surrendered by the constitution to the United States. The new states admitted into the Union since the adoption of the constitution have the same rights as the original states in the tide water, and in the lands under them, within their respective jurisdictions. Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; Sage v. City of New York, 154 N. Y. 61, 47 N. E. 1096, 38 L. R. A. 606. Fresh-water lakes in England are private property, and the crown and public possessed no such rights in fresh-water lakes as they possessed in tide waters. In navigable fresh-water rivers above the flow of the tide the bed of the river belonged to the owners of the adjacent soil to the middle of the stream. In this country the doctrine of private ownership has been generally recognized as the rule of the common law, but it has been held to be inapplicable to the condition of many of those states in which the inland rivers and lakes are large. The provision of article 17, § 1, of the constitution was evidently for the purpose of establishing the right of the state to the beds of all navigable waters in the state, whether lakes or rivers, or fresh or salt, to the same extent the crown had in England in the sea, and in the arms and inlets thereof, and in the tidal rivers, and to eliminate the distinctions existing under the rule of the common law in this respect. Whatever rights the respondent possesses were acquired and became vested before the adoption of our state constitution. This

court has decided that these rights are to be determined by the rule of the common law, so far as not repugnant to or inconsistent with the constitution and laws of the United States, or the organic act or laws of Washington Territory, or incompatible with the institutions and conditions of society in this state, and that the riparian owner is to be protected in the use and enjoyment of the water naturally flowing by or over his land, and, for the purpose of protecting the rights of a grantee of the government,—such as Russell V. Peabody and his grantees are in this case,—his title relates back to the first act necessary on his part in the proceedings to acquire title. Benton v. Johncox, 17 Wash. 277, 49 Pac. 495, 39 L. R. A. 107. Section 16, art. 1, of the constitution expressly provides that "no private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner." Section 1, art. 17, of the constitution, under which the appellant claims that the state is the sole and absolute owner of the bed, the shore to high-water mark, and the waters of Lake Whatcom, and can dispose of such waters as it sees fit, expressly protects all persons in asserting their claims to vested rights. That section reads as follows: "The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up and including the line of ordinary high water within the banks of all navigable rivers and lakes: provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state." Though this section has the effect, as has been held by this court in Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632, and Harbor-Line Com'rs v. State, 2 Wash. 530, 27 Pac. 550, of vesting in the state the entire and exclusive ownership of the beds and shores of all navigable waters, it should not be construed as affecting the rights of riparian proprietors upon nonnavigable water courses, though their source is in navigable waters. The use of the water in such nonnavigable streams is not inconsistent with the retention of the fee in the bed of navigable waters in the state. Cocheco Co. v. Strafford, 51 N. H. 455. The provisions of section 16, art. 1, of the constitution protect private property from confiscation for a public use; and the proviso to article 17, § 1, clearly indicates that so far as rights had become vested, notwithstanding the other provisions of the section, the owner thereof should have the right to assert them in the courts; and, if this language means anything, it is that those rights should be protected and safeguarded by the courts. In Crook v. Hewitt, 4 Wash. 749, 31 Pac. 28, this court quotes with approval from Gould, Waters (2d Ed.) p. 396: "The right to the use of the water in its natural flow is not a mere easement or appurtenance, but is inseparably annexed to the soil itself."

In Rigney v. Water Co., 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425, it is said: "The right to the use of water flowing over land is identified with the realty, and is a real and corporeal hereditament. And this right is a substantial one, and may be the subject of sale or lease like the land itself." In the two cases cited it is held that every riparian proprietor in the absence of a grant, license, or prescription limiting his right, is entitled to have the stream which passes over or adjacent to his land flow as it is wont by nature, affected only in quantity or quality by the consequence of a reasonable use thereof by other proprietors, and that the riparian proprietor's right to the flow of the water is inseparably annexed to the soil, and passes with it, as a part and parcel of it; that a riparian proprietor may divert the water from the stream as it passes through his own land, without license from the proprietors above him, if he does not obstruct the water from flowing as freely as it was wont, and without license from the lower proprietors, if he restores the water to its natural channel before it enters their land, and does not materially diminish its flow. The constitutional provision relied upon by the appellant does not in any way affect the rights of the respondent in the flowage of Whatcom creek as they existed in 1899, before the adoption of the constitution, when this action was instituted. The mere fact that the state owns the bed of Lake Whatcom has little, if any, bearing on the diversion of the waters so that they cease to flow in Whatcom creek; for, as we have said, the flow of the water in the creek is not inconsistent with the retention by the state of the fee in the bed of the lake. The right of the state over the waters of Lake Whatcom is such as pertains to sovereignty alone. That is the right to use, regulate, and control these waters as a common highway for commerce, trade, and intercourse, and to grant the soil in the bed of the lake so that it might become private property, subject to the paramount right of public use for navigation. In short, that the rights of the state in the navigable waters thereof are the same rights as pertained to the sovereign at common law in the sea, its bays, arms, and inlets. But conceding that by article 17, § 1, of the constitution absolute ownership is now in the state, so that the state can dispose of the waters as well as the soil, the vested rights of the respondent, notwithstanding, are preserved to it. That is the right to the use of the water in its natural flow as it existed before the adoption of the constitution, when the United States granted to Russell V. Peabody, under the donation act, the land over which Whatcom creek flows, of which the lands of the respondent are a part. The constitution having reserved to the respondent its vested rights, the legislature, except under the power of eminent domain, upon making compensation, could not devest it of that right, either directly or indirectly, for a public or private use. Yates v. Milwaukee, 10 Wall. 497, 19

L. Ed. 984. As was said by Justice Miller in the case last cited: "This riparian right is property and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, once vested, the owners can only be deprived in accordance with established law, and if necessary that it be taken for the public good upon the due compensation." As was said by the Missouri court of appeals in Meyers v. City of St. Louis, 8 Mo. App. 266: "When it is settled that riparian rights are property,—and of this there seems to be no doubt,—the question as to the right to take them is at an end." In Mohr v. Gault, 10 Wis. 513,—a case where one undertook to cut a new channel so as to carry off the waters of a small lake by another way than through the usual outlet, on which the complainant's mill was situated,—it was held that the owners along the natural outlet had a legal right to the natural and usual flow of the water of the lake through such outlet.

The legislature of the state of New York had given a grant to the city of Rochester authorizing it to enter upon, control, and use the waters of Hemlock and Canadice Lakes for the purpose of procuring a water supply for said city. These were large, fresh-water, navigable lakes, connected by a small stream; and Honeoye creek was their outlet, upon which was located Smith's water mills. Under legislative authority the city of Rochester proceeded to extract and carry away a part of the waters of these lakes, to the detriment of Smith. The city was enjoined, and the court of appeals held that the right to the usufructuary enjoyment of the undiminished and undistributed flow which a riparian owner possesses in the case of nonnavigable streams applies to fresh-water, navigable lakes, save that the public has an easement in such waters for the purposes of travel, as on a public highway, which easement, as it pertains to the sovereignty of the state, is inalienable, and gives to the state the right to use, regulate, and control the waters for the purposes of navigation; and the right to divert the waters for other purposes than navigation, although public in their nature, can only be acquired under and by virtue of the sovereign right, or eminent domain, and upon making just compensation. Smith v. City of Rochester, 92 N. Y. 463. Two lakes were the reservoirs from which a creek was fed. One sought to appropriate the waters of the lakes in such a manner that the quantity of the water flowing down the creek would be interfered with. Plaintiffs were riparian owners and appropriators of the creek. The supreme court of California says: "If the tapping of these lakes by appellants reduces the amount of water to which plaintiffs are entitled, or shortens the period of time in which they might otherwise secure water from the creek, then the acts of appellants, clearly, are a trespass upon plaintiffs' rights,—exactly the same kind of trespass as though the creek was

tapped, and that amount of water directly taken therefrom, without any molestation of the lakes." Baxter v. Gilbert (Cal.) 58 Pac. 129. Plaintiff was the owner of certain mills built on his own land, on the banks of the Cottonwood river. The mills were propelled by water power obtained by means of a dam across the river. The city of Emporia constructed a system of waterworks for the purpose of supplying the citizens with water for domestic use, for extinguishing fires, and for manufacturing purposes. It purchased a tract of land on the banks of the pond above the plaintiff's dam, dug a well 25 feet in diameter and 26 feet in depth on its own land, and from 70 to 100 feet from the bank of the pond. This well drew its supply of water from the pond by percolation through a bed of gravel at the bottom of the well. It sank one pipe into the well, and another it extended directly into the pond; the latter to be used in case of fire. By means of engines and pumps it supplied the citizens from the well with water needed for ordinary purposes. The supply of water in the river at certain seasons of the year was inadequate for running the mills, and the plaintiff was forced to suspend work and allow his mills to stand idle. Justice Brewer, in delivering the opinion of the supreme court of Kansas on this state of facts, said: "The amount of water now used by the city, and its present effect upon the plaintiff's business, do not determine the question of right or remedy. · The continuance of the waterworks, as well as the growth of the city, will increase the demand; and, if the present abstraction can be sustained, there is no legal principle upon which the future and larger abstraction can be restrained. Now, that the flow of water in the natural channel of a surface stream is a property right of the riparian owner is unquestioned and familiar law. Shamleffer v. Mill Co., 18 Kan. 24. If an individual should, by digging a new channel a few hundred feet above Soden's dam, attempt to divert the flow of the stream, beyond doubt he would be restrained. And this restraint would be granted not because of the mere fact of digging a channel, but because thereby the natural flow of the stream was prevented; not because of the manner, but because of the fact, of the diversion. The restraint would be granted as readily if the abstraction was by pipes and pumps as if by channel and a change of current. The principle is this: That whatever of benefit, whether of power or otherwise, comes from the flow of water in the channel of a natural stream, is a matter of property, and belongs to the riparian owner, and is protected in law just as fully as the land which he owns. It cannot be taken for private use except by his consent, and for public use only upon due compensation. With these general and conceded principles, let us now inquire as to the validity of the grounds upon which the action of the city is sought to be justified. The fact is obvious that by means of the pipe running into the pond there will be, in case of fire, a direct abstraction

of water, and the fact is found that by means of the well there is an indirect abstraction. The flow of water is, as heretofore stated, thus interfered with, and the power diminished. It is in evidence that while at certain seasons of the year the water supply is more than enough for all of plaintiff's present uses, and that during such seasons the consumption of water in the city would work no present injury, yet at other seasons the supply is insufficient, and some or all of his mills are compelled to stop running. Hence, naturally, any substraction of the water would tend to increase the time during which his mills must be idle, and therefore work present and positive injury,—an injury increasing with the increasing consumption by the city. Further, if plaintiff is entitled to this water power at all, he is entitled to all of it, and may increase the number of mills, or amount of machinery propelled by it, until his uses shall wholly exhaust it. So that matters of amount really fade out of sight, and the question is one of right and title." City of Emporia v. Soden, 25 Kan. 588. In the same case the city sought to justify the taking of the water as a riparian owner owning the lands above the plaintiffs. On this point Justice Brewer says: "While the undiminished flow of the stream is conceded to be the right of every riparian owner, yet this right has always been limited to this extent: that each riparian owner may, without subjecting himself to liability to any lower riparian owner, use of the water whatever is needed for his own domestic purposes and the watering of his stock. The city is a riparian owner, and, whether it uses little or much, it is simply taking for domestic purposes. Each individual citizen of Emporia may buy land on the banks of the river, and then take for domestic uses whatever amount of water he needs. What the individual separately may do, the city, representing all the individuals, has done. Does the manner in which the result was accomplished make any difference in the right? This argument is plausible, but not sound. A city cannot be considered a riparian owner, within the scope of the exception named. The amount of water which an individual living on the banks of a stream will use for domestic purposes is comparatively trifling. Such use may be tolerated upon the principle, 'De minimis non curat lex.' It is a use which must always be anticipated, and may reasonably be considered as one of the benefits of the ownership of the banks of a natural stream. Every one proposing to utilize the power of running water should reasonably expect that the stream is chargeable with such a slight burden. It is only a fair equalization of rights. But the taking of water for the supply of a populous and growing city stands upon an entirely different basis. No man can foresee this; and, if it were tolerated, no one would dare to expend money in utilizing this power, for fear of its soon being taken from him without compensation, and with total loss to his investment. The city, as a corporation, may own land on the banks, and thus in one sense be a

riparian owner. But this does not make each citizen a riparian owner. And the corporation is not taking the water for its own domestic purposes. It is not an individual. It has no natural wants. It is not taking for its own use, but to supply a multitude of individuals. It takes to sell. Again, the statute under which the city is acting (Comp. Laws 1879, p. 997, § 1) authorizes the taking of water 'for the purpose of supplying the inhabitants of such cities with water for domestic use, the extinguishment of fires, and for manufacturing and other purposes.' It would be strange if the city could destroy plaintiff's water power without compensation, and then sell it to other manufacturers, and thus build up rival establishments." City of Emporia v. Soden, supra. See, also, Stein v. Burden, 24 Ala. 130; Garwood v. Railroad Co., 83 N. Y. 400.

It is not disputed in this case that the effect of the appellant's intake pipes, as laid into the lake, is simply to afford an additional channel for the outflow of the lake, and that respondent's mill is deprived of the amount of water by the city actually diverted. Now, no one can do indirectly what the law will not permit him to do directly. On this point, in the case of City of Emporia v. Soden, supra, the court says: "It is also a general proposition that a man may not do indirectly what he may not do directly. Unquestionably, a party may not run pipes into plaintiff's mill pond, or dig a channel to it, and thus divert the water. May he accomplish the same result by digging a well upon the very banks, and so near thereto that the water oozes out from the pond into the well, and be beyond the reach of law, so long as he keeps a wall of earth between the well and the pond? If this were recognized as law, protection to the owners of water power would rest on slender foundations. Often the banks of a stream are composed of very porous soil, or it may be there is, as in this case, a bed of gravel through which the water runs as through a sieve. Is the owner of the pond, then, at the mercy of any one who, avoiding the more direct and public method of pipe or channel, resorts to the equally effective means of adjacent wells? And if a well on the very bank would be restrained, may the same result be accomplished by digging one a few feet off? It would seem as though but one answer could, in justice, be given,—that the owner of an established power is entitled to protection against any substraction therefrom, whether sought to be accomplished by direct or indirect methods." The intake pipes of the appellant, 24 inches in diameter, placed 6 feet below the bed of Whatcom creek, a quarter of a mile from the outlet of the lake, through which the appellant diverts the water that would otherwise flow down the bed of the creek, certainly cause an indirect diversion of the water from the bed of the creek to the extent of the capacity of the pipe; and this diversion is just as much a violation of the rights of the respondent as if

the pipe was in the bed of the creek above the respondent's mill, where it was originally placed by the water company.

The Great Pond Cases from Massachusetts and Maine have no bearing upon this case; for, as the appellant says, the colonial ordinances of Massachusetts changed the common law as to great ponds in both those states. The cases from New York cited by appellant, on the Mohawk and Hudson rivers, grew out of the civil law prevailing in the Netherlands, under which titles were granted to the original settlers. Smith v. City of Rochester, 92 N. Y. 482. The only case that the appellant has cited bearing upon the question here involved, and contrary to the authorities we have cited, and the views we have expressed, is from Minnesota,—the case of Minneapolis Mill Co. v. Bond of Water Com'rs of City of St. Paul (Minn.) 58 N. W. 33. In that case the appellants were a corporation created by acts of the territorial legislature, and authorized to build and maintain dams in the Mississippi river, at the falls of St. Anthony, for the development of water power, and for the use and sale of such power. Dams were erected and maintained under this authority forming such power. After this the legislature authorized the city of St. Paul to purchase, and thus was purchased, the property and franchises of a private corporation theretofore engaged in supplying said city with water. Under the provisions of law the city extended this system, and established a pumping station at Lake Baldwin, a body of water with an area less than a mile square, and by means of its pumps forced water through conduits to the city for public use. The outlet of this lake is Rice creek, and this creek empties into the Mississippi river a few miles above the dams built and maintained by appellants. The claim was that the result of this diversion was to greatly diminish the volume which came to the dam, and to materially affect and reduce the water power. The supreme court of Minnesota, in rendering their opinion, say: "The appellants are riparian owners on a navigable or public stream, and their rights as such owners are subordinate to public uses of the water in the stream, and their rights under their charter are, equally with their rights as riparian owners, subordinate to these public uses. There can be no doubt but that the public, through their representatives, have the right to apply these waters to such public uses without providing for making compensation to riparian owners. The navigation of the stream is not the only public use to which these waters may be thus applied. The right to draw from them and supply water for the ordinary use of cities in their vicinity is such a public use, and has always been so recognized. At the present time it is one of the most important public rights, and is daily growing in importance as population increases. Thus taking water from navigable streams or lakes for such ordinary public uses, the power of the state is not limited or controlled by the rules which obtain between riparian owners as

to the diversion from and its return to its natural channels. Once conceding that the taking is for a public use, and the above proposition naturally follows." Not an authority is cited by that court to sustain these views. This case was appealed to the supreme court of the United States. That court held that the property rights of the plaintiff in error as riparian owners were to be measured by the rules and decisions of the state courts of Minnesota, and that some of the decisions of the state courts of Minnesota were inconsistent with the decision of the court in the case under review, and for that reason the supreme court of the United States affirmed the judgment. St. Anthony Falls Water-Power Co. v. Board of Water Com'rs of the City of St. Paul, 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497. That case has little, if any, bearing on the one under consideration; for the supreme court of this state, in cases heretofore cited, has repeatedly held the rule to be otherwise than that laid down by the supreme court of Minnesota. It may be conceded that at the time this action was tried and judgment was entered, the city of New Whatcom, under the law approved March 14, 1899 (Sess. Laws 1899, p. 250), authorizing municipal ownership of certain public utilities, had the right to take and appropriate from Lake Whatcom an ample supply of water for all uses and purposes, public and private, and that it had the right to build dams or other works across the outlet of any lake or water course for the purpose of storing and retaining water therein up to and above high-water mark: provided, that such dam did not obstruct, impede, or interfere with navigation or other public use: and provided, further, that, if any private property should be necessary for such purposes, the same was to be condemned or purchased. In this case, however, no steps have been taken to condemn or purchase the property of the respondent in the flow of Whatcom creek, which the appellant has appropriated, and this is one of the very things the city was required to do when exercising the powers conferred on it by the act of 1889. Mr. Loggie, a lessee of the respondent's mill, with the permission of the appellant, but without permission or direction from the respondent, in 1899 (the year of the trial of this case) built a temporary dam at the outlet of the lake for the purpose of storing the water for use during the dry season. There is testimony tending to show that by means of this dam a sufficient quantity of water was stored in the lake for the use of the appellant, and also the respondent's mill, during the dry season of that year. We are at a loss to know why this fact is urged against the correctness of the trial court's decree. The city of New Whatcom is a large and growing city, and it may need, under its water system, all of the outflow waters of Lake Whatcom both summer and winter. The question involved in this action is the right of the city to direct a part or all of these waters without compensating the respondent, the owner of this out-

flow at the mouth of the natural outlet. We hold that the judgment and decree of the court below was correct, and is fully sustained by reason and the decisions of this and almost all other courts, and for that reason the judgment must be affirmed, subject to the modifications hereinafter indicated.

While it is no part of the office of the court to consider the ways and means by which the appellant may comply with the decree entered against it, yet, in this case, as a numerous population will be suddenly deprived of that which is essential to their health and existence if the decree is at once enforced, we modify the decree of the court below as follows: The said appellant shall have 60 days from the filing of this opinion to purchase from or otherwise arrange with the respondent for the use of said flowage, or, if such purchase or arrangement cannot be made, to commence proceedings in the superior court to condemn the property and rights of the respondent in Whatcom creek as indicated in this opinion. If condemnation proceedings are instituted within said time, then the injunction granted by the decree of the court below shall be stayed until the final determination of such condemnation proceedings: provided, such proceedings are prosecuted by the appellant with due diligence. The respondent to recover its costs in the court below and on this appeal.

Fullerton and Anders, JJ., concur. Reavis, C. J., concurs on the ground that respondent made the first appropriation and use for a beneficial purpose.

Dunbar, J. I concur in the affirmance of the judgment, but not in what is said in relation to the modification. The appellant can pursue its legal remedies, if it has any, like any other litigant; and the respondent is as much entitled to its legal remedy, unqualified by prescribed conditions, as though its adversary were an individual.

WINCHELL

v.

CITY OF WAUKESHA.

(*Supreme Court of Wisconsin, April 9, 1901.*)

[85 N. W. Rep. 668.]

Sewer System — Polluting Streams — Riparian Owner's Rights.*— Defendant built a sewer system with an outlet into a river just above plaintiff's farm. Plaintiff's house, which was 850 feet from the river,

*See City of Valparaiso *v.* Hagen (Ind.), 3 Mun. Corp. Cas. 51, and *note*, for a contrary view from that taken in the principal case which expressly refuses to concur with the logic of the Indiana court in that case. See, in accord with the principal case, Huffmire *v.* City of Brooklyn, 4 Mun. Corp. Cas. 181, and *note*, collecting the authorities.

became almost uninhabitable at times because of the defilement of the river, and the water was rendered unfit for stock and bathing, and the value of plaintiff's property was decreased. Experts testified that the sewage could be deodorized and rendered unobjectionable by an expenditure of $5,000. *Held*, that the sewer as maintained constituted a nuisance, and plaintiff was entitled to an injunction restraining defendant from using the stream unless the sewage was first deodorized, since, in the absence of legislative authority, a city has no greater right to pollute a stream than a private individual.

Same—Same—Same—Legislative Authority.—An act of the legislature authorizing a city to construct a sewer system does not give the city the implied authority to pollute a stream of water to the detriment of the rights of riparian owners.

Same—Same—Deodorizing—Evidence.—In an action by a riparian owner to enjoin a city from emptying its sewage into a stream, evidence that the sewage could be deodorized at a small expense was properly admitted as bearing on plaintiff's right to relief by injunction.

Injunction—Petition—Failure to Allege in Words of Statute.—Rev. St. 1898, § 3180, provides that the circuit court shall have jurisdiction to abate nuisances in case the nuisance may work an irreparable injury, interminable litigation, multiplicity of actions, or if the injury is continuous and constantly recurring, or there is not an adequate remedy at law. *Held*, that where a petition for an injunction alleged facts showing irreparable injury, and that the same was continuous and recurring, and that the legal remedy was inadequate, the petition was not objectionable in failing to allege any of the conditions prescribed in the statute *in hæc verba*.

Same—Jurisdictional Limitation.—Where plaintiff sued to enjoin the maintenance of a nuisance by defendant, and alleged an injury of $6,000, and the nuisance could be abated by an expenditure of $5,000, the action was not beyond the jurisdiction of the county court, which was limited to $25,000.

Judgment—Modification.—Where the trial court found that until December, 1901, would be a reasonable time to allow defendant to change its sewer system, a judgment which restrained defendant after December, 1901, from continuing to empty its sewage into the river in such condition as to create a nuisance to plaintiff will be modified by adding, "unless the same shall have been first deodorized and purified so as not to contain foul or noxious matter capable of injuring plaintiff or her property, or causing nuisance thereto."

Appeal from Waukesha county court; M. S. Griswold, Judge.

Action by Martha Winchell against the city of Waukesha to restrain defendant from emptying its sewage into Fox river. From an interlocutory judgment and injunction, defendant appeals. Modified.

The plaintiff, a married woman having a family, is the owner of a farm of about 115 acres, south of Waukesha,

Case Stated.

bounded on the northwest and west by a small, shallow, and sluggish stream called "Fox River," which runs through the city of Waukesha, and is the only natural drainage course therefrom. On this farm, about 850 feet east of the river, is the residence of herself and family. About 10 years ago the city of Waukesha installed a sewer system, now aggregating about 14 miles, the whole of which empties at one point into said Fox river about a quarter of a mile north of plaintiff's land. The number of connections with said sewer system has been continually increasing since its installation, so that now there are about 550 closets connected therewith, in addition to the sewer of the State Industrial School for Boys. Prior to the construction of the sewer, the waters of Fox river were reasonably clear, suitable for bathing and for the watering of stock. As the volume of sewage increased, defilement of these waters began to be apparent, so that beginning some five or six years before the commencement of the suit they became offensive to the smell, and from them arose an extremely disagreeable odor or stench, which, whenever the wind was westerly, and especially in warm weather and stagnant conditions of atmosphere, pervaded the plaintiff's residence, causing great distress and discomfort, and in some cases illness. The waters were further rendered unfit for bathing or for watering stock. It appeared that the flow of water in the river is only about double the amount of sewage water flowing into it; that shortly below the mouth of the sewer were what are described as "pockets," or deep places in the river, into which a large percentage of the sewage solids are accustomed to settle and remain during the process of decomposition. It also appeared that the volume of water flowing through the stream is tending to decrease from year to year, and that the use of the sewerage system is upon the increase. Plaintiff was the owner of the farm at the time the construction of the sewer was commenced, but is not shown to have had any knowledge of the details of that system, or where it was to empty, nor of the probable effect upon the waters of the stream. It was also made to appear that at an expense of some $5,000 there could be installed septic beds or tanks whereby the sewage could be purified and rendered innoxious and inoffensive. The present suit was brought to abate and enjoin the maintenance of this sewer as a nuisance, and to recover damages caused to the plaintiff's premises thereby, it being alleged that they were greatly deteriorated in sale value. The trial court, after finding facts substantially as above recited, and that until December 1, 1901, is a reasonable time to allow the defendant city to change its sewage system and provide for the doing away with the nuisance to the plaintiff, declared its conclusion of law "that the defendant should be restrained from continuing such nuisance, and from further emptying or depositing its sewage into said Fox

river in such a condition and manner as to create the nuisance to the plaintiff, and that said injunction take effect December 1, A. D. 1901," whereupon an interlocutory judgment was entered restraining the city "from discharging its sewage through its sewer system into the Fox river at any time after the 1st day of December, A. D. 1901," and further directing that the question of plaintiff's damages be determined by a jury trial at the next regular term of court. From such interlocutory judgment this appeal is brought.

H. J. Frame, City Atty. (Ryan & Merlon, of counsel), for appellant.

Armin & Waile, for respondent.

Dodge, J. (after stating the facts). The findings and evidence disclose a very obvious nuisance, which, if created and maintained by an individual, would entitle the plaintiff to the aid of a court of equity to effect its abatement, and to damages if pecuniary injury be established, within the decisions of this court which are cited and summarized in Middlestadt v. Potato Co., 93 Wis. 1, 4, 66 N. W. 713. Two entirely well recognized elements of special and private injury are established, namely, substantial defilement of the waters of a stream flowing along and over plaintiff's land so as to prevent the beneficial use of the water, and so as to injure and impair the use of the land itself; also the creation of noisome and noxious odors interfering with the comfort, convenience, and probably the health of plaintiff and her family in the occupation of her habitation. These injuries to the plaintiff in the use of her property and to the property itself are none the less special and private because by the same acts may be created and maintained a public nuisance in defiling the waters of a navigable stream, or in polluting the atmosphere to the detriment of the public health. It has been declared by this court in Harper v. City of Milwaukee, 30 Wis. 365, 372, that "the general rule of law is that a municipal corporation has no more right to erect and maintain a nuisance than a private individual possesses, and an action may be maintained against such corporation for injuries occasioned by a nuisance for which it is responsible in any case in which, under like circumstances, an action could be maintained against an individual." Again, in Hughes v. City of Fond du Lac, 73 Wis. 380, 383, 41 N. W. 407, 408, it is said, "A municipal corporation is no more exempt from liability in case it creates a nuisance, either public or private, than an individual." These statements are very broad, and, appellant insists, must yield to various exceptions and limitations. Certain decisions elsewhere are urged upon our attention, notably Coal Co. v. Sanderson, 113 Pa. 126, 6 Atl. 453, and City of Valparaiso v. Hagen, 153 Ind. 337, 54 N. E. 1062, 48 L. R. A. 707. The

Sewer System—Polluting Streams—Riparian Owners—Rights.

logic of the line of decisions illustrated by the latter case may be summarized as follows: The collection and disposal of sewage is for the public safety. Cities therein are performing a governmental function for the general public, not a merely corporate power. The use of streams for such public purposes is within the right of the state government. No constitutional obstacle exists unless private property is actually taken. Impairment of use of running water or of the atmosphere is mere indirect and consequential damage, and does not amount to a taking of any property. The general authority to municipalities to construct sewer systems is a direct legislative authority to use the natural drainage courses, since in no other manner can the outflow be dismissed. Hence, no liability being expressly imposed, none results from the use of the water courses for such purpose, in absence of negligence. Some of the propositions in this chain of reasoning have received apparent approval in our own decisions. It has been said that garbage and sewage disposal is the performance of a governmental function for the general public (Kuehn v. City of Milwaukee, 92 Wis. 263, 65 N. W. 1030); also that more limited rules of liability apply in the exercise of such function than of more distinctively municipal or corporate powers (Kuehn v. City of Milwaukee, supra; Folk v. Same [Wis.] 84 N. W. 420); that mere consequential injury is not a taking of property within the constitutional prohibition (Alexander v. City of Milwaukee, 16 Wis. 247; Colclough v. Same, 92 Wis. 182, 186, 65 N. W. 1039); that the state for certain public purposes has absolute dominance over navigable streams, without liability to riparian owners (Cohn v. Boom Co., 47 Wis. 314, 2 N. W. 546). Some of these questions, as we view the case before us, are not essential to its decision, and are of such vast importance, and the effect of a decision so far reaching, that it ought not to be made until squarely presented and fully argued. We cannot but recognize that, as the density of our population increases, as our citizens engage in new and greater industries, and as the municipal aggregations of population multiply and expand, the original purity of the streams and water basins cannot be wholly preserved. They are the natural and unavoidable courses and receptacles of drainage, through and into which must flow the refuse of human habitation and industry. How far these changing conditions must bring about a yielding of the private rights of continued purity of those lakes and streams to the necessity of use thereof for the public and general health and convenience, and upon what terms such yielding shall come, are primarily questions of policy for the legislature, within the limits of its power over private rights defined by the constitution. When, if ever, the legislature shall enact that streams generally or any streams shall be used as sewers without liability to the owners of the soil through which they run, the question of constitutional protection to private rights

may be forced upon the courts for decision. Until such enactment is made, however, in clear and unambiguous terms, we shall be slow to hold by inference or implication that it has been made at all. The right of the riparian owner to the natural flow of water substantially unimpaired in volume and purity is one of great value, and which the law nowhere has more persistently recognized and jealously protected than in Wisconsin. Not alone the strictly private right, but important public interests, would be seriously jeopardized by promiscuous pollution of our streams and lakes. Considerations of æsthetic attractiveness, industrial utility, and public health and comfort are involved. Amid this conflict of important rights, we cannot believe that the legislature concealed, in words merely authorizing municipalities to raise and expend money for the construction of sewers, a declaration of policy that each municipality might, in its discretion, without liability to individuals, take practical possession of the nearest stream as a vehicle for the transportation of its sewage in crude and deleterious condition. At that stage in its logic we cannot agree with the Indiana court in City of Valparaiso v. Hagen. The authority granted to municipalities is to construct sewers, but subject to the general legal restrictions resting upon such corporations forbidding invasion of private rights by creation of nuisance or otherwise. This view of the legislative purpose is enforced by the consideration that, although liquid sewage must flow off along the general drainage courses of the vicinity, it is by no means physically necessary that it should carry with it the solids in an offensive or unhygienic condition. Hackstack v. Improvement Co., 66 Wis. 439, 29 N. W. 240. It is matter of common knowledge, and of proof in this case, that there are practicable methods for the decomposition and practical destruction of such solids before delivering them into open water courses; the most modern methods, as explained in the evidence here, being treatment in septic bacteria tanks, whereby the decomposition and resolution into inoffensive and innocuous fluids, gases, and mineral solids is greatly expedited. This method, it appears, could be installed at Waukesha at a cost approximating $5,000. It is not probable that the legislature has wittingly authorized the defilement, and almost destruction, of our streams to enable such trifling measure of economy to municipalities. The great weight of authority, American and English, supports the view that legislative authority to install a sewer system carries no implication of authority to create or maintain a nuisance, and that it matters not whether such nuisance results from negligence or from the plan adopted. If such nuisance be created, the same remedies may be invoked as if the perpetrator were an individual. The following are selected from an almost unlimited array of decisions: City of Jacksonville v. Lambert, 62 Ill. 519; Same v. Doan, 145 Ill. 23, 29, 33 N. E. 878; O'Brien v. City of St. Paul, 18

Same—Same—Same—Legislative Authority.

176 (Gil. 163); Clark v. Peckham, 9 R. I. 455; Good v. of Altoona, 162 Pa. 493, 29 Atl. 741; Owens v. City of ister, 182 Pa. 257, 37 Atl. 858; Hapskell v. City of New ord, 108 Mass. 208; Morse v. City of Worcester, 139 Mass. N. E. 694; Morgan v. City of Danbury, 67 Conn. 484, . 499; Platt v. City of Waterbury, 72 Conn. 531, 45 Atl. 8 L. R. A. 691; Chapman v. City of Rochester, 110 N. 3, 18 N. E. 88, 1 L. R. A. 296; Missouri v. Illinois, 180 —, 21 Sup. Ct. 331, 45 L. Ed. —; Carmichael v. City of kana (C. C.) 94 Fed. 561.

om what has already been said our conclusion is obvious he creation and maintenance of a nuisance by the defendty, causing special and private damage to the plaintiff, appears from the finding and evidence, and that plaintiff itled to the same remedies as if the defendant were a e individual. One of the forms of relief authorized by n 3180, Rev. St. 1898, is accorded by the judgment led from, and, subject to modification to be hereafter sted, was entirely proper under the circumstances. endant assigns error upon the admission of certain evitending to show that its sewer system might practicably uipped with septic tanks, or other apparatus to deodorize and render innocuous the outflow, construing this as tending to charge negligence upon the city. The rule is, of course, familiar that in an action without a jury the admission of improper evidence alone not work reversal, but we do not deem this evidence per. While there was no issue of negligence either in uction or management of the sewer, the prayer for an tion was addressed to a court of equity, and the effect h remedy upon the defendant was an important contion in guiding the court to a decision whether it ought ly the drastic process of injunction, or ought to leave aintiff to her other remedies. It was extremely material t consideration to ascertain whether such injunction utterly destroy the entire sewer system of Waukesha, ubject its citizens to serious inconvenience, and peril of e. The fact that the system as now existing could still d by adding appliances involving no very great expense es relief by injunction, and in that respect the evidence dmissible.

Same—Pleading—8.

s contended that the complaint warrants no relief in , because it fails to allege in hæc verba any of the several conditions of equitable relief prescribed by section 3180, Rev. St. 1898. The complaint does, however, allege facts showing fully irreparable injury, and that the same is continuously and ntly recurring, and that any remedy obtainable in a of law would be inadequate. This must suffice without g either of these conclusions from the specific facts also d.

Same—Pleading—Failure to Allege Words—8.

objection is raised to the jurisdiction of the county court

of Waukesha county for that such count is limited to cases in which "the value or amount in controversy or the amount claimed or sought to be recovered after deducting all payments and set-offs shall not exceed $25,000." We find nothing in this record to support the view that such limit is transcended. The plaintiff's property, which the action is brought to protect, is of value only about $10,000. The damages claimed are but $6,000. If, as appellant contends, we consider the effect upon defendant, we find uncontradicted evidence that the nuisance complained of can be abated by appliances costing only about $5,000. Thus, on any theory of the value or amount in controversy, it is less than $25,000, and we need not consider the several constructions possible to the statute.

Same—Jurisdictional Limitation.

While the unlimited form of injunction embodied in the judgment is not discussed as an independent ground of error, yet it is before us upon this appeal, and we do not feel justified in approving the judgment without such qualification as will make obvious the meaning which we are persuaded the trial court intended to express. The judgment restrains defendant "from discharging its sewage through its sewer system into the Fox river at any time after December 1, 1901." Similar language received consideration in Morgan v. City of Danbury, supra, and was sustained on the ground that the word "sewage" would be understood to refer only to "the refuse and foul matter, solid or liquid," carried through the sewer by the water therein flowing. In that case, as here, it was contended that some disinfecting apparatus would effectively purify the water. In the case at bar the findings make apparent the views of the trial court that some such addition to defendant's present system could be made practically effective to prevent the damage of which plaintiff complained, and that he had such appliance in mind in his finding "that until December 1, 1901, is a reasonable time to allow said defendant city to change its sewage system, and provide for the doing away with the nuisance to plaintiff." The same idea evidently persisted in the conclusion of law and order for judgment, for it is there declared that defendant "should be restrained from continuing such nuisance, and from further emptying or depositing its sewage into said Fox river in such condition and manner as to create the nuisance to the plaintiff." We have no doubt the judgment was intended to express the same thing, and only upon that construction do we approve of it. To the end, however, that any ambiguity may be removed, we deem it best to modify the judgment as below. The judgment of the county court is modified by adding to the second paragraph the following words, to wit: "Unless the same shall have first been so deodorized and purified as not to contain foul, offensive, or noxious matter capable of injuring the plaintiff or her property or causing nuisance thereto," and that, as so modified, the same is affirmed.

Judgment—Modification.

PECK *et al.*

v.

CITY OF GRAND RAPIDS.

(*Supreme Court of Michigan, Dec. 31, 1900.*)

[84 N. W. Rep. 614.]

Construction of Sewer—Proceedings.*—Under the charter of the city of Grand Rapids, the city cannot construct a sewer under proceedings for grading and graveling a street.

Sewer Not a Necessary Part of Street.—A sewer is not a necessary part of a street, and separate proceedings must be taken for its construction.

Appeal from superior court of Grand Rapids, in chancery; Richard L. Newnham, Judge.

Bill by Thomas M. Peck and Roger W. Butterfield against the city of Grand Rapids. From a decree dismissing the bill, complainants appeal. Reversed.

Case Stated.

The common council of the city of Grand Rapids adopted the following resolution: "Resolved, by the common council of the city of Grand Rapids, that the grading and graveling of Butterworth avenue, a public street in the city of Grand Rapids, from the west line of South Lane avenue, formerly Shepard street, a public street in said city, to the west limits in said city, in said described portion of said Butterworth avenue, and also including the construction of the necessary bridges, culverts, gutters, cross walks, manholes, catch-basins, approaches, and cesspools in said described portion of said Butterworth avenue, is a necessary public improvement." The estimate made by the board of public works in pursuance of said resolution, under the requirements of the charter, was $8,635. A contract was let for $10,997.41. The total assessment upon property owners was $11,500; the difference between the two sums consisting of the expenses of assessment, printing, engineering, etc. In all the proceedings of the city authorities, the only improvement mentioned is the "grading and graveling of the street." The city authorities included in this work the cost of a sewer 12 inches in diameter and 3,800 feet long, extending the whole length of the improvement. Complainants appealed to the board of review, but their protests were ignored, and the construction of the sewer and assessments ratified. Complainants then filed this bill to set these assessments aside, claiming that they were absolutely

*See Dillon's Mun. Corp. (4th Ed.) sec. 809.

void. Decree was entered in the court below dismissing the bill.

Butterfield & Keeney, for appellants.

Lant K. Salsbury, for appellee.

Grant, J. (after stating the facts). The only question to determine is, can the common council construct a sewer under the guise of grading and graveling a street? The charter of the city confers no such authority. Under the act of 1873, providing for a board of public works in and for the city of Grand Rapids, "said board is empowered to determine and establish the grade lines of all streets; * * * to locate all necessary sewers; * * * to cause to be graded, graveled, paved, planked, or covered with other materials, all such streets; * * * and to construct all such main and lateral sewers, * * * as the common council shall by resolution declare to be necessary improvements." By Act No. 444, tit. 3, § 10, subd. 39, Loc. Acts 1895, the common council is empowered "to establish, construct, maintain, repair, enlarge and discontinue within the highways, streets, etc.," "such * * * sewers as the common council may see fit, with a view to the proper draining and sewerage of said city." By the Local Acts of 1875 the board of public works was authorized to construct all such main and lateral sewers as the common council of the city of Grand Rapids shall by resolution declare to be necessary public improvements. The charter also provides for two classes of bonds, viz. "street improvement bonds, and sewer construction bonds." Charter, tit. 6.

Construction of Sewer—Proceedings.

Counsel for the defendant seek to justify this action of the common council on the ground that the sewer is a necessary part of the street, and therefore comes within the resolution of the council, although the word "sewer" is not mentioned in any of the proceedings. A sewer is not a necessary part of the street, and when action is taken to lay out, establish, grade, and pave a street, the construction of a sewer is not included within these terms. The district benefited by a sewer may be, and usually is, different from a district benefited by the establishment of a street or highway. The inhabitants of the city are entitled to a hearing on each of such public improvements, and neither can be included in the other. Grading and graveling may be a necessary improvement, while the construction of a sewer may not. The common council, under this charter, must first act in each case. The language of this court, speaking through Chief Justice Campbell, in Clay v. City of Grand Rapids, 60 Mich. 451, 27 N. W. 596, is applicable here: "If a city council can do one thing and call it something else, so as to confound roads with sewers, and the repair of one with the building of the other, there is no safety to citizens against the grossest

Sewer Not a Necessary Part of Street.

usurpations and injustice." That case rules this. See, also, White v. City of Saginaw, 67 Mich. 33, 34 N. W. 255, and Hoyte v. City of East Saginaw, 19 Mich. 39. The cases of Nelson v. City of Saginaw, 106 Mich. 659, 64 N. W. 499, and Brown v. City of Saginaw, 107 Mich. 643, 65 N. W. 601, are not in conflict with this opinion. The assessment is void because the construction of the sewer was included in it. Decree reversed, and decree entered in this court for complainants in accordance with this opinion. The other justices concurred.

FREEPORT WATER COMPANY, Plff. in Err.,

v.

CITY OF FREEPORT.

(*Submitted October 31, 1900. Decided March 25, 1901.*)

[21 Sup. Ct. Rep. 493.]

Municipal Corporations—Power to Bind Themselves Not to Regulate Water Rates.*—Municipal corporations may be invested by statute with the power to bind themselves by an irrevocable contract not to regulate water rates.

Same—Same—Legislative Authority—Constitutional Reservations.—The power to prescribe such regulations and provisions for corporations as the legislature may deem advisable, which is reserved by the Illinois general incorporation act, § 9 (Starr & C. Stat. p. 1006), is not limited to the external business of corporations to the exclusion of interference with their internal management.

Same—Power to Grant Exclusive Privilege Must Be Explicit.†—The power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. If inferred from other powers it is not enough that the power is convenient to other powers; it must be indispensable to them.

Same—Same—Illinois Statute.—A contract giving a water company the right to charge certain rates for thirty years without interference by new ordinances changing rates is not authorized by Ill. act April 9, 1872, empowering cities and villages to contract with such companies for a supply of water for public use for a period not exceeding thirty years, and Ill. act April 10, 1872, empowering such municipalities to authorize persons or private corporations to construct and maintain waterworks "at such rates as may be fixed by ordinance and for a period not exceeding thirty years," since, under the rule requiring strict construction of such grants, the clause "for a period not exceeding thirty years" quali-

*See City of Danville *v.* Danville Waterworks, 2 Mun. Corp. Cas. 479, and *note*.

†See *note*, 3 Mun. Corp. Cas. 432.

fies the words "construct and maintain, but does not qualify the words "at such rates as may be fixed by ordinance."

Same—Power of a City to Fix Water Rates—Implied Condition of Privileges.—The power of a city to fix water rates, conferred by the Illinois statutes of 1872, became a condition of privileges thereafter granted to water companies.

Functions of State Circuit Courts—When Federal Courts Will Follow State Courts.—The question what functions the circuit courts of a state may have is a matter of state law, on which the decisions of the state courts will be followed by a Federal court.

In Error to the Supreme Court of Illinois to review a decision affirming a judgment overruling a demurrer to defendant's pleas in an action by a water company against a city for the price of water. Affirmed.

See same case below, 186 Ill. 179, 54 N. E. 862.

Statement by Mr. Justice McKenna:

This is an action of assumpsit brought by the plaintiff in error against the defendant in error in the circuit court of Stephenson county, state of Illinois, for the price of water delivered by plaintiff in error to defendant in error between January 1, 1896, and July 1, 1896.

Case Stated.

The cause of action was based upon a contract arising from an ordinance passed by defendant empowering the plaintiff to construct certain waterworks in the city of Freeport, and the renting from the plaintiff by the city of certain fire hydrants.

To the defenses of a subsequent ordinance reducing the rental of such hydrants, it was replied that the latter ordinance impaired the obligation of the first ordinance as a contract and therefore violated the Constitution of the United States.

The case was presented upon a demurrer to the pleas of the defendant. The demurrer was overruled by the circuit court, and the plaintiff electing to stand by its demurrer, judgment was entered for the defendant for costs. On appeal to the supreme court the judgment was affirmed (186 Ill. 179, 57 N. E. 862), and to that action this writ of error is directed.

The facts presented by the pleadings are as follows:

The plaintiff is a corporation organized and existing under the general laws of the state, and the defendant is a municipal corporation organized under the general act of the state entitled "An Act to Provide for the Incorporation of Cities and Villages," approved April 10, 1872, and in force July 1, 1872, and the acts amendatory thereof.

That on the 6th of June, 1882, defendant enacted an ordinance giving and granting to Nathan Shelton or his assigns the exclusive right and privilege, for the term of thirty years from the 1st of July, 1882, to supply the city of Freeport and its citizens with water suitable for domestic and manufacturing purposes. The city reserved the right of purchasing the works at the end of thirty years. If such right should not be exercised, the rights and privileges of the plaintiff were to be

extended for a further period of twenty-five years. There were the usual provisions for the use of the streets, the character of the works and appliances, the quality of the water, and provision was made for the extension of the system as the growth of the city and its needs might require.

Section 7 of the ordinance was as follows:

"The said Nathan Shelton or his assigns shall erect double-nozzle fire hydrants upon all mains ordered laid by said city council in said city at the rate of not less than ten to each mile of said mains, and shall erect said fire hydrants whenever and wherever said city council shall direct. And said city shall pay to said Nathan Shelton or his assigns as an annual rental for the first 100 of said hydrants the sum of $100 each, for all said hydrants over 100 and up to 150 an annual rental of $80 each, and for all of said hydrants over 150 an annual rental of $50 each, which said rentals shall be payable semi-annually on the 15th days of January and July in each year; and the pay of each hydrant shall commence when each hydrant is actually ready for use and the city officially notified thereof, and shall continue during the full term specified in this ordinance, unless said city shall sooner become the owner of said waterworks as hereinbefore provided, in which event said rental shall cease. The pay of any hydrant shall cease whenever any hydrant is out of repair, or unfit for use, or incapable of throwing a stream as provided for in this ordinance."

The city was given the right to use water free of charge from the hydrants on streets curbed and guttered, for flushing and washing the gutters, and from any hydrant, upon giving notice, for flushing any and all sewers; also water free of charge for the use of the fire department and for the city hall, public offices, public schools, churches, and for four public drinking fountains if the city should erect the same.

Maximum rates to consumers were fixed for purposes which were especially enumerated, and it was provided that "rents for other purposes not herein named will be fixed by meter measurement, as may be agreed upon between the consumer and the water company, not exceeding the following rates." The rates were specified.

Section 13 was as follows:

"This ordinance shall become binding as a contract between the city of Freeport, Illinois, and Nathan Shelton or his assigns, upon the filing with the city clerk of a written acceptance thereof by Nathan Shelton or his assigns, provided the same shall be done within thirty days from the passage and publication of this ordinance; and this ordinance when so accepted shall not be altered, amended, or changed in any way without the concurrence and consent of both parties thereto and interested therein, or their successors or assigns."

On June 27, 1882, Shelton filed a written acceptance of the terms and conditions of the ordinance. On August 8, 1882,

he assigned all his rights to plaintiff, of which defendant had notice. Plaintiff has complied with all things required of Shelton or of it, has constructed 121 hydrants as required by § 7 and as ordered by defendant, which were in operation on January 1, 1896, and defendant paid all rentals which became due January 1, 1896; and that there was due for rentals subsequent to that date, and up to the 15th of July, 1896, the sum of $5,840.

The pleas of the defendant in substance alleged that it was a municipal corporation organized under the general laws of the state for the incorporation of cities and villages, and that, in pursuance of the statutes of the state relating to waterworks, it passed the ordinance of June 6, 1882.

It was alleged in plea No. 1 that the water rates fixed by such ordinance "were then unjust, unreasonable, and oppressive to the citizens and taxpayers of said city, and so remained and continued to be unjust, unreasonable, and oppressive from said enactment thereof up and until the subsequent action of the council of said city had in relation thereto. . . ." This charge was substantially repeated in the other pleas, and it was alleged that the new rates were just and reasonable. The ordinance of February 11, 1896, was set out in full. The following is all that is necessary to be quoted:

"Sec. 1. That the Freeport Water Company, a corporation, now furnishing to the city of Freeport and its inhabitants water for fire protection, domestic uses, and manufacturing purposes, and other uses and purposes, shall be entitled to charge and receive therefor, and for the use of water meters, the rates and prices hereinafter fixed and no more.

"Fire Protection and Public Uses.

"Sec. 2. Said corporation shall be entitled to charge and receive from the city of Freeport for all water furnished for fire protection and other public uses and purposes as hereinafter defined and enumerated an annual rental or rate of fifty dollars ($50) for each double-nozzle fire hydrant now in use in the said city of Freeport, or any that may be ordered hereafter by the city council of the city of Freeport, such rental to be payable in semiannual instalments on the fifteenth (15th) day of January and July, provided that it shall be shown by a certificate signed by the committee on water, city engineer, and chief of fire department that test of the works of said corporation has been made within six (6) months, and that such works have been in such condition as to furnish at all times and for any length of time a fire pressure sufficient to throw six (6) fire streams from six (6) hydrant chosen by the committee on water, each through fifty (50) feet of 2½ inch hose and 1-inch nozzle from each hydrant so chosen to a height of one hundred (100) feet, or maintain its equivalent in pressure at the nozzles of the hydrants. Where the works of said corporation are not shown to be maintained in condition to furnish such fire pressure the rental shall be one half the amount

hereinbefore fixed. The above rate and rental shall be in full payment for all water furnished as follows: For fire protection, including the furnishing and setting of fire hydrants for all water used by the fire department in extinguishing fires and in practice, for all water used by the committee on water for cleaning, washing, flushing gutters and sewers, in said city, and for all water used for the city hall, fire and police stations, and other city offices, for drinking fountain in park when desired, and for all public schools and churches in the city."

The ordinance further established in detail maximum rates for water to be furnished for domestic and manufacturing uses and other uses when furnished without meter; also rates when furnished or measured by meter. There was a penalty provided for charging greater rates than those established.

The ordinance was to take effect from the date of its passage, and the right of further regulation was reserved.

The rates established by the ordinance of February 11, 1896, were considerably less than those established by the ordinance of June, 1882.

The assignment of error presented the contentions in various ways that the ordinance of February 11, 1896, and the statutes in pursuance of which it was claimed to have been passed, violated the Constitution of the United States in that the ordinance and statutes impaired the obligation of the contract made by the ordinances of June, 1882, with plaintiff, and deprived it of its property without due process of law.

The statutes of the states which are urged as applicable to the contentions of the parties are cited in the margin.*

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*An Act to Enable Cities and Villages to Contract for a Supply of Water for Public Use, and to Levy and Collect the Tax to Pay for Water so Supplied. Approved April 9, 1872, in force July 1, 1872.

Sec. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That in all cities and villages where waterworks may hereafter be constructed by an incorporated company, the city or village authorities in such cities and villages may contract with such incorporated company for a supply of water for public use, for a period not exceeding thirty years. (Public Laws of Illinois of 1871, p. 271.)

An Act to Provide for the Incorporation of Cities and Villages. (Approved April 10, 1872; in force July 1, 1872.)

Sec. 1. The city council or board of trustees shall have power to provide for a supply of water by the boring and sinking of artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs, or waterworks, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years; also to prevent the unnecessary waste of water; to prevent the pollution of the water, and injuries to such wells, pumps,

Messrs. George C. Fry and James W. Hyde for plaintiff in error.

Mr. A. J. Hopkins for defendant in error.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

The supreme court of the state based its decision on its opinions in the case of Danville v. Danville Water Co. 178 Ill. 299, 53 N. E. 118, and 180 Ill. 235, 54 N. E. 224. In that case the same statutes were involved as in the case at bar, and the contract which was claimed was based upon a substantially similar ordinance to that involved in the pending controversy.

It is not clear from the opinion of the court whether it intended to decide that municipal corporations could not be invested with the power to bind themselves by an irrevocable contract not to regulate water rates. If so, we cannot concur in that view. We have decided to the contrary many times, and very lately in Los Angeles v. Los Angeles City Water Co. (1900) 177 U. S. 558, 44 L. Ed. 886, 20 Sup. Ct. Rep. 736. See also Walla Walla v. Walla Walla Water Co., 172 U. S. 7, 43 L. Ed. 344, 19 Sup. Ct. Rep. 77, where the subject is more extensively discussed and the cases reviewed. See also New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. Ed. 525, 6 Sup. Ct. Rep. 273.

Municipal Corporations—Power to Bind Themselves Not to Regulate Water Rates.

We do not mean to say that if it was the declared policy of the state that the power of alienation of a governmental function did not exist, a subsequently asserted contract would not

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cisterns, reservoirs, or waterworks. (Public Laws of Illinois of 1871, p. 259; 1 Starr & C. Stat. p. 785, § 175.)

An Act to Enable Cities, Towns, and Villages Incorporated under any General or Special Law of this State to Fix the Rates and Charges for the Supply of Water Furnished by any Individual, Company, or Corporation to Any Such City, Town or Village and the Inhabitants Thereof. (Approved June 6, 1891; in force July 1, 1891.)

Sec. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That the corporate authorities of any city, town, or village now or hereafter incorporated under any general or special law of this state, in which any individual, company, or corporation has been or hereafter may be authorized by such city, town, or village to supply water to such city, town, or village and the inhabitants thereof, be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company, or corporation to such city, town, or village and the inhabitants thereof, such rates and charges to be just and reasonable. And in case the corporate authorities of any such city, town, or village shall fix unjust and unreasonable rates and charges, the same may be reviewed and determined by the circuit court of the county in which such city, town, or village may be. (Public Laws of Illinois of 1891, p. 85; 1 Starr & C. Stat. p. 868, § 458.)

be controlled by such policy. In Stevenson v. School Directors, 87 Ill. 255, and in Davis v. School Directors, 92 Ill. 293, it was held that a school board could not make a contract for the employment of teachers to extend beyond the current year, and this was put upon the ground of the inability of one board to control the exercise of the functions of its successor. In East St. Louis v. East St. Louis Gaslight & Coke Co., 98 Ill. 415, 38 Am. Rep. 97, decided in May, 1881, the doctrine of those cases was not adopted as applicable to a contract for gas rates, nor was it rejected. One justice asserted it with great emphasis, quoting those cases. The court, however, left it disputable, placing the decision on other grounds. There was at least admonition in those cases to persons entering into contracts with municipalities. If there was anything more, we need not decide, as there are other grounds for judgment.

The supreme court did decide in the Freeport Case (1) that, the water company having been incorporated under the general incorporation act of the state, approved April 18, 1872, the provisions of the act entered into and formed a part of its charter, and that by § 9 of the act (inserted in the margin*) the right of the legislature to regulate and provide for the rates at which the company should supply water to the city was reserved; and (2) that the language of the act of April 9, 1872, and in force July 1, 1872 (inserted in the margin), did "not necessarily imply the power to make and fix rates." The court further said in 178 Ill. at page 309, 53 N. E. p. 122: "The authority 'to contract for a supply of water for public use for a period not exceeding thirty years' does not necessarily imply that the price of the supply should be fixed for the entire period. The supply could be made for the entire term, but the price is to be determined from time to time, and the rates to be settled by the rules of the common law. Carlyle v. Carlyle Water, Light, & Power Co., 52 Ill. App. 577."

It is true that we do not necessarily have to follow this decision. When § 10, article 1, is invoked we decide for ourselves the fact of contract,—not only its formal execution, but its legal basis in law, and therefore construe for ourselves the statutes of the state upon which it is claimed to rest. In such case, we have also said, we are disposed to incline to

*Section 9 of the general incorporation act, cited in the opinion, is as follows:

The general assembly shall, at all times, have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act: And provided further, That this act shall not be held to revive or extend any private charter or law heretofore granted or passed concerning any corporation. (Section 9, Corporation Act; Starr & C. Stat. p. 1006.)

agreement with the state court. These principles hardly need the citation of cases. They have become elementary. We may quote, however, the language of Mr. Justice Bradley in Burgess v. Seligman, 107 U. S. 20, 27 L. Ed. 359, 2 Sup. Ct. Rep. 10. After stating the peculiarity of the existence of two co-ordinate jurisdictions in the same territory, and the necessity for the exercise of mutual respect and deference to avoid anomalous and inconvenient results, and yet asserting the necessity in the Federal courts of the right to exercise an independent judgment, the learned Justice said:

"Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the Federal court, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts."

Applying these principles to the case at bar, we solve its questions. The supreme court of the state in passing on the case, not only considered the acts of the 9th and 10th of April, 1872, regarding municipalities, but also, as we have said, the general incorporation act of April 18, 1872. Under the latter the plaintiff was incorporated, and it was held that the act "must be regarded as entering into and forming part of the charter" of the plaintiff. The statute reserves to the general assembly the power to prescribe in the government of corporations "such regulations and provisions as it may deem advisable." The language is very comprehensive. Regard-

ing it alone, it is difficult to conceive what objects of legislation are not covered by it. The supreme court of the state has construed it to be of greater import than the usual reservation of the power to alter and amend the charters of corporations.

Same—Same—Legislative Authority—Constitutional Reservations.

The plaintiff, however, contends that it was not intended by the terms, "regulations and provisions," "to interfere with the internal business management of the corporation itself," but to regulate "those classes of acts which control the relation existing between stockholders as individuals and the corporation as an entirety, and the relations between corporations and third persons; that is, the manner of carrying on their business or exercising the powers of a corporation." We think the construction is too narrow. The statute made no distinction between the internal and the external business of corporations, —between their relations to stockholders and their relations to third persons. Such are but special exertions of the power which the legislature possesses.

In Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989, a provision was passed on, of an act defining the general powers and duties of manufacturing corporations, as affecting the beer company. The general statute was enacted in 1809, and the provision construed was as follows: "Provided always, that the legislature may from time to time, upon due notice to any corporation, make further provisions and regulations for the management of the business of the corporation and for the government thereof, or wholly repeal any act or part thereof, establishing any corporation, as shall be deemed expedient." The beer company was incorporated in 1828 "for the purpose of manufacturing malt liquors in all their varieties." It was held that the provisions of 1809 were adopted in the charter of the beer company, and were a part of the contract between the state and the company, rendering the latter subject to the exercise of that power; and the seizure and forfeiture of certain malt liquors, which were intended to be sold in violation of the prohibitory liquor law passed in 1869, were sustained.

But assuming that § 9 of the general incorporation act is correctly interpreted by plaintiff, we are brought to the question of the power of the city to make an irrevocable contract for thirty years, fixing water rates. The power is claimed under the statutes of 1872, heretofore quoted. The supreme court of the state, as we have seen, decided against the claim, and the principle of Burgess v. Seligman applies if the ruling of the court and the contention of the plaintiff is "balanced with doubt." There were no previous interpretations of the statutes by the state courts upon which the plaintiff had a right to rely. It acted upon the faith of the statute alone, and committed its rights to a judicial interpretation of the statute. The rule which governs interpretation in such cases has often

been declared. We expressed it, following many prior decisions, in Detroit Citizens' Street R. Co. v. Detroit R. Co., 171 U. S. 48, 43 L. Ed. 67, 18 Sup. Ct. Rep. 732, to be that the power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. If inferred from other powers, it is not enough that the power is convenient to other powers; it must be indispensable to them.

Same—Power to Grant Exclusive Privileges Must Be Explicit.

In Smith v. McDowell ex rel. Hall, 148 Ill. 51, 23 L. R. A. 393, 35 N. E. 141, the supreme court of the state expressed the rule as follows: "Their power [the power of municipal corporations] is measured by the legislative grant, and they can exercise such powers only as are expressly granted, or are necessarily implied from the powers expressly conferred."

The supreme court of the state applied these principles. It held that an irrevocable contract for specific rates was not indispensable to the other powers with which the cities of the state were invested. And a distinction was made between a contract which related to a governmental function, which the regulation of rates was said to be, and a contract which related to franchises which, though public in their nature, yet were not governmental, which the supply of water was said to be. This distinction, it was held, the statutes of 1872 observed, and gave the power to make one kind of contract, but not the other,—the power to contract for a supply of water, but not the power to contract "to pay a fixed and unalterable rate for thirty years." This was deduced from the silence of the statute of the 9th of April and the necessity of resolving all ambiguities in favor of the public. But ambiguity disappears, it was said, when the statute of the 9th was considered with the statute of the 10th, as it necessarily had to be, as the statutes were "in pari materia, and should be construed together." Section 1 of the act of the 10th of April "authorizes," the court said, "the city council to empower a private corporation to construct and maintain waterworks at such rates as may be fixed by ordinance. The meaning of this language is not that the waterworks are to be maintained at such established rate as may be fixed by one ordinance for a period not exceeding thirty years. The clause, 'for a period not exceeding thirty years,' qualifies the words 'construct and maintain the same,' but does not qualify the words 'at such rates as may be fixed by ordinance.'"

Same—Same—Illinois Statute.

The statutes are certainly ambiguous, and in resolving the ambiguity in favor of the public the court applied the rule declared in many cases. We said in the Railroad Commission Cases, 116 U. S. 307, sub nom. Stone v. Farmers Loan & T. Co., 29 L. Ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191, by Chief Justice Waite, of the power of the regulation of rates:

"This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it

can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall in Providence Bank v. Billings, 4 Pet. 514, 561, 7 L. Ed. 939, 955, 'its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.' This rule is elementary, and the cases in our reports where it has been considered and applied are numerous."

These remarks are obviously applicable to the Illinois statutes. The question is whether the power given to the municipalities of the state was to be continuing or occasional, indeed only special in its purpose, intended to have but one exercise, and then bound in contract for thirty years. If the latter had been the intention it would have been natural to express it. The fullness of sovereignty can be taken for granted, and naturally would be and should be taken for granted. An example is afforded by the act of June 6, 1891. By that act the corporate authorities of any city which have authorized or shall authorize any individual, company, or corporation to supply water, "be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company, or corporation. . . ." There is no explicit provision for repetitions of the power,—none declaring the power conferred a continuing one. Who now doubts that it is? If rights were claimed and were pleading for a different interpretation, we might have to listen to them, but now, undisturbed by them, we yield without resistance to that meaning which the subject-matter demands in the absence of negativing words.

Our conclusion is that the powers conferred by the statutes of 1872 can, without straining, be construed as distributive. The city council was authorized to contract with any person or corporation to construct and maintain waterworks "at such rates as may be fixed by ordinance, and for a period not exceeding thirty years." The words, "fixed by ordinance," may be construed to mean by ordinance once for all to endure during the whole period of thirty years; or by ordinance from time to time as might be deemed necessary. Of the two constructions that must be adopted which is most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as justice to both parties might require at a particular time.

It is also urged by plaintiff that the ordinance of February 10, 1896, deprives the plaintiff of its property without due process of law. The grounds of this contention are that (1) by the statute of June 6, 1891, none of the circumstances which, it is claimed, constitute a rate just and reasonable, are required to be considered by the authorities of cities, nor is previous notice required to be given to the parties furnishing water; (2) establishing rates is a legislative, not a judicial act,

and that, therefore, the power to review and determine them, given by the statute to the circuit court, is void; (3) the cities, towns, and villages of the state are made judges in their own cases.

The first ground is answered by San Diego Land & Town Co. v. National City, 174 U. S. 750, 43 L. Ed. 1158, 19 Sup. Ct. Rep. 804, and we may say there is no question of the reasonableness of the rates. It was alleged in the pleas of the defendant that the rates of the ordinance of June, 1882, were unreasonable when established. This was conceded by the demurrer. It was also alleged that the rates established by the ordinance of February 10, 1896, were just and reasonable. This was also conceded. The allegations, therefore, must be accepted as true conclusions from investigation. And it was averred, besides, that "the plaintiff refused to treat" with a committee appointed by the city council, "and neglected to reduce or fix such rental and water rates so as to make them just, reasonable, and fair."

Same—Power of a City to Fix Water Rates—Implied Condition of Privileges.

Of the second ground it is only necessary to say that the statutes of 1872 gave to the city the power to fix the rates. It became a condition, therefore, of the privileges granted to plaintiff. The act of 1891 only repeated and emphasized the power.

The third ground urged why plaintiff is deprived of its property without due process of law is as abstract, as free from real grievance to plaintiff, as the other grounds. With what functions the circuit court of the state may be invested may not be of Federal concern. It is also a matter of construction, in which we might be obliged to follow the state courts. The ground we are now reviewing seems not to have been presented to the supreme court of the state, either in the case at bar or the cases referred to by it and upon which it based its opinion.

Functions of State Circuit Courts—When Federal Court Will Follow State Courts.

In Danville v. Danville Water Co. 178 Ill. 299, 53 N. E. 118, and 180 Ill. 235, 54 N. E. 224, the provision of the statute was referred to, but not in such way that it can be confidently said that the power given to the circuit court was to only review the rates fixed by the city council, and to determine them to be reasonable or unreasonable, or whether the court could go farther and fix rates. The former seems a natural construction. But whether it is or not, the plaintiff has yet no reviewable grievance. No power has been attempted to be exercised by the circuit court against the plaintiff, and no judicial remedy has been denied it.

Judgment affirmed.

Mr. Justice White, with whom concurs Mr. Justice Brewer, Mr. Justice Brown, and Mr. Justice Peckham, dissenting:

The far-reaching consequences which must result from the principles upon which this case is decided, and the conflict

between those principles and what I conceive to be previous well-settled rules of law, impel me to state the reasons for my dissent.

The legislature of Illinois, in 1872, passed a law entitled "An Act to Enable Cities and Villages to Contract for a Supply of Water for Public Use, and to Levy and Collect a Tax to Pay for Water Supplied." The act in full is as follows:

"Sec. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That in all cities and villages where waterworks may hereafter be constructed by by an incorporated company, the city or village authorities in such cities and villages may contract with such incorporated company for a supply of water for public use, for a period not exceeding thirty years.

"Sec. 2. Any such city or village, so contracting, may levy and collect a tax on all taxable property within such city or village, to pay for the water so supplied."

This act was approved on April 9, 1872. Public Laws of Illinois, 1871–1872, p. 271.

At the same session an elaborate law was passed entitled "An Act to Provide for the Incorporation of Cities and Villages." Article 10, under the heading "(Miscellaneous Provisions)—Water" in § 1, provided as follows:

"Sec. 1. The city council or board of trustees shall have power to provide for a supply of water by the boring or sinking of artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs, or waterworks, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years; also to prevent the unnecessary waste of water; to prevent the pollution of the water, and injuries to such wells, pumps, cisterns, reservoirs or waterworks."

This was followed, in subsections 2 and 3, by the granting of full power to municipal corporation, in the event they determined to construct their own waterworks, to acquire land, etc., to levy taxes, and to provide for the collection of water rates or assessments for the use of the water to be supplied to the inhabitants from the works to be constructed. This act was approved on April 10, 1872. Public Laws of Illinois, 1871–1872, p. 259.

At the same session an act was passed entitled "An Act Concerning Corporations." It was in effect a general law regulating the organization of private corporations in the state of Illinois. Section 9 thereof, in part, reads as follows:

"Sec. 9. The general assembly shall at all times have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act. . . ."

This act was approved April 18, 1872. Public Laws of Illinois, 1871–1872, p. 299.

None of the foregoing acts contained an emergency clause: and hence, although approved on different dates, each act went into force on the same day, viz., July 1, 1872. Constitution of 1870, Illinois, Art. 4, § 13; 1 Starr & C. Ann. Stat. 2d Ed. p. 125.

The defendant in error, the city of Freeport, a municipal corporation, on June 6, 1882, enacted an ordinance giving Nathan Shelton or his assigns the right of constructing, maintaining, and operating waterworks for the term of thirty years from the 1st day of July, 1882, for the purpose of furnishing fire protection to, and for the supply of, said city of Freeport and the inhabitants thereof with water suitable for domestic and manufacturing purposes. The ordinance consisted of fourteen sections. It provided for a stand pipe, that the pumping machinery should possess a capacity of at least 3,000,000 gallons of water in twenty-four hours, to be increased as the growth of the city and its needs required, and that not less than 8 miles of mains, of specified dimensions and quality, should be laid for the distribution of water. Ample provision was also made for the extension of these mains by the water company, at its cost, upon the direction of the city government. The obligation was further imposed upon Shelton or his assigns to erect double-nozzle fire hydrants at the rate of not less than ten to each mile of main pipe, whenever and wherever the city council should direct. Payment was to be made by the city for fire hydrants by an annual rental for the first 100 of $100 each; for all said hydrants over 100 and up to 150, an annual rental of $80 each; and for all said hydrants over 150, an annual rental of $50 each. It was expressly provided, in § 8 of the ordinance, that the hydrant rentals "shall continue during the full term specified in this ordinance, unless said city shall sooner become the owner of said waterworks as hereinbefore provided, in which event said rental shall cease." By § 6 the city reserved to itself the right to acquire the waterworks by purchase at the expiration of thirty years from July 1, 1882, the valuation of the property to be determined as provided in the section.

The ordinance contained provisions for the use of water "free of charge from the hydrants on streets curbed and guttered, for the purpose of washing and flushing the gutters, and from any hydrant for the purpose of flushing any and all sewers in said city whenever the city council shall deem it necessary for sanitary purposes, upon giving notice to the person in charge of said waterworks." It was also provided that "the city shall have water free of charge for the use of the fire department, and for furnishing the city hall and the offices occupied for city purposes, for all public schools of the city, for all churches, and for four public fountains for drinking only, and one fountain in the public square or park should the

city erect the same." Full specifications were contained in the ordinance as to the maximum charge to be made for water to be furnished individual consumers. In other words, the ordinance formulated a complete system, not only for the construction of the works, but for their operation during the time specified therein.

It was provided that the ordinance should become a binding contract upon its acceptance in writing by Shelton within a stated time, and when so accepted its provisions should not be changed, altered, or amended in any way without the consent of both parties thereto or their successors or assigns.

On June 27, 1872, within the time limited, Shelton filed his written acceptance of the contract. In the following August he assigned all his rights to the plaintiff in error, a corporation organized under the provisions of the general statute relating to private corporations, approved April 18, 1872, above referred to. The assignment was recognized by the municipality, and it is unquestioned that the works were constructed in accordance with the contract, and that all obligations which it imposed were discharged by the company to the satisfaction of the municipality.

Up to January 1, 1896, under the contract, 121 hydrants were placed in position, and up to that date the annual rental as provided in the contract was regularly paid by the municipality.

In 1891 an act was passed by the legislature of the state of Illinois entitled, "An Act to Enable Cities, Towns, and Villages Incorporated under any General or Special Law of this State to Fix the Rates and Charges for the Supply of Water Furnished by Any Individual, Company, or Corporation to any Such City, Town, or Village and the Inhabitants Thereof." Briefly stated, this act, as its title indicated, empowered municipal corporations to prescribe by ordinance "maximum rates and charges for the supply of water furnished by such individual, company, or corporation to such city, town, or village and the inhabitants thereof, such rates and charges to be just and reasonable." The act, moreover, provided that the reasonableness of the rates prescribed by the municipality might be tested by proceedings before a designated court.

Availing itself of the power conferred by this statute, the city of Freeport on February 11, 1896, passed an ordinance reducing the rates stipulated to be paid under the contract of 1882. It is necessary, however, only to consider, for the purposes of this case, the reduction made on the contract price for the public hydrants. At the reduction they were to be paid for annually at the uniform rate of $50 each. Whilst thus seeking to reduce the sum which the city was to pay for the hydrants, the ordinance in effect retained all the contract obligations for the benefit of the city resting upon the water company, among them being the duty to lay additional mains

as directed, and to furnish free water for schools, churches, and other purposes. The city refusing to pay any longer for the hydrants at the original contract price, an action was instituted to recover an amount asserted to be then due under the contract. Without stating the form of pleadings, it suffices to say that on the one hand the right of the water company to recover according to the rates fixed by the original contract was asserted, and on the other the obligation of the city to pay only at the reduced rates was alleged. It was expressly charged in the pleadings on behalf of the water company that the enforcement of the ordinance reducing the rates would be an impairment of the obligations of the contract, and hence a violation of the contract clause of the Constitution of the United States.

The case was ultimately taken to the supreme court of Illinois, and, upon the authority of the analogous case of Danville v. Danville Water Co., 178 Ill. 299, 53 N. E. 118, judgment went in favor of the city and against the water company. 186 Ill. 179, 57 N. E. 862. The opinion of the court in the Danville Case was not unanimous, three of the seven judges dissenting. Without attempting to reproduce in its details the reasoning by which the court reached its conclusion, it seems to me that all the views expressed are embodied in the following propositions:

That the fixing of water rates was a public attribute, which from its nature was incapable of being alienated or restrained by the obligations of a contract, even although express authority to do so was conferred by the legislature on the municipality. That even if this was not the case, to contract for rates to be paid for a definite term required authority of the legislature, and that no such grant to the municipality had been conferred in this case, because, albeit the legislative acts gave power to contract for a definite time for a supply of water, this did not give the right to fix the rates to be paid for the water during the time for which the municipality was authorized to contract; the argument being that the power to contract for a definite time is one thing, and the fixing of the rates for the same time for the water contracted for is another and different thing. That even under the hypothesis that the power to contract for a definite time included the authority to fix the rates for such time, the reservation found in the general private incorporation law operated to confer upon the legislature the right to change the rates, because the contract although originally made by the city with an individual, had been assigned to the defendant, a private corporation organized under the general private incorporation law.

These propositions practically embrace all but one of the contentions urged in the argument at bar, and their consideration will therefore substantially dispose of the controversy, except in the particular above referred to, which we shall separately notice before concluding. Inverting the order in which

they have been stated, I come to consider their correctness. In logical sequence the questions which arise are these: Was there power in the legislature to confer upon the municipality authority to contract for water for public use, and fix by contract the rates to be paid by the city for a stated period? If so, was such power conferred upon the municipality, and did it contract under it? If it did so, was the contract to that effect taken out of the protection of the contract clause of the Constitution of the United States by reason of the reservations contained in the general private incorporation law under which the water company was organized?

It is not even intimated in the opinion below that there was any express limitation in the Constitution of the state of Illinois restricting the power of the legislature to authorize a municipality to contract for water for public use for a fixed period, and to agree upon the rates to be paid therefor for such time. That in the absence of such restriction the legislature of a state may contract by statute, or may empower a municipality to contract, for water for public use for a stated period, and fix the rates to be paid during such term for the same, and that such contract if made is protected from impairment by the Constitution of the United States,—is no longer an open question. New Orleans Waterworks Co. v. Rivers (1885) 115 U. S. 674, 29 L. Ed. 525, 6 Sup. Ct. Rep. 273.

In that case the exclusive right granted was to continue for fifty years, and the act which it was held constituted a contract stipulated for the furnishing of a supply of water for public use during the continuance of the contract, "in consideration whereof its franchises and property [of the company], used in accordance with its charter, were exempted from taxation, state, municipal, and parochial." (p. 677, L. Ed. p. 526, and Sup. Ct. Rep. p. 275.) After observing that the case before the court was controlled by the decision in New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. Ed. 516, 6 Sup. Ct. Rep. 252, the court, speaking through Mr. Justice Harlan, said (p. 680, L. Ed. p. 527, and Sup. Ct. Rep. p. 276):

"The two are not to be distinguished upon principle; for if it was competent for the state, before the adoption of her present Constitution, as we have held it was, to provide for supplying the city of New Orleans and its people with illuminating gas by means of pipes, mains, and conduits placed at the cost of a private corporation, in its public ways, it was equally competent for her to make a valid contract with a private corporation for supplying, by the same means, pure and wholesome water for like use in the same city."

In the Gas Company Case, beginning at page 660, L. Ed. p. 520, and Sup. Ct. Rep. p. 257, the court considered and held untenable the contention "that, as the supplying of New Orleans and its inhabitants with gas has relation to the

public comfort, and, in some sense, to the public health and the public safety, and, for that reason, is an object to which the police power extends, it was not competent for one legislature to limit or restrict the power of a subsequent legislature in respect to those subjects." After reviewing various decisions bearing upon this feature of the case, the court said (p. 664, L. Ed. p. 521, and Sup. Ct. Rep. p. 260):

"Numerous other cases could be cited as establishing the doctrine that the state may by contract restrict the exercise of some of its most important powers. We particularly refer to those in which it is held that an exemption from taxation for a valuable consideration at the time advanced, or for services to be thereafter performed, constitutes a contract within the meaning of the Constitution. St. Anna's Asylum v. New Orleans, 105 U. S. 362, 368, 26 L. Ed. 1128, 1130; Home of the Friendless v. Rouse, 8 Wall. 430, 19 L. Ed. 495; New Jersey v. Wilson, 7 Cranch, 164, 166, 3 L. Ed. 303; Piqua Branch of State Bank v. Knoop, 16 How. 369, 376, 14 L. Ed. 977, 980; Gordon v. Appeal Tax Court, 3 How. 133, 11 L. Ed. 529; Wilmington & W. R. Co. v. Reid, 13 Wall. 264, 266, 20 L. Ed. 568, 569; Humphrey v. Peques, 16 Wall. 244, 248, 249, 21 L. Ed. 326, 327; Farrington v. Tennessee, 95 U. S. 679, 689, 24 L. Ed. 558, 561."

The doctrine of the cases just cited was applied in St. Tammany Waterworks Co. v. New Orleans Waterworks Co., 120 U. S. 64, 30 L. Ed. 563, 7 Sup. Ct. Rep. 405. It was also recognized and applied in Walla Walla v. Walla Walla Water Co., 172 U. S. 7, 9, 43 L. Ed. 345, 19 Sup. Rep. 77. In that case the court held valid a stipulation contained in a contract with the water company by which the city of Walla Walla bound itself not to erect waterworks during the stipulated life of a contract, viz., twenty-five years. Speaking of the earlier decisions to which we have above referred, the court, speaking through Mr. Justice Brown, said (p. 9, L. Ed. p. 345, and Sup. Ct. Rep. p. 81):

"It is true that in these cases the franchise was granted directly by the state legislature, but it is equally clear that such franchises may be bestowed upon corporations by the municipal authorities, provided the right to do so is given by their charters. State legislatures may not only exercise their sovereignty directly, but may delegate such portions of it to inferior legislative bodies as, in their judgment, is desirable for local purposes. As was said by the supreme court of Ohio in State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262, 293: 'And, assuming that such a power' (granting franchises to establish gas works) 'may be exercised directly, we are not disposed to doubt that it may also be exercised indirectly, through the agency of a municipal corporation clearly invested, for police purposes, with the necessary authority.' This case is directly in line with those above cited. See also

Wright v. Nagle, 101 U. S. 791, 25 L. Ed. 921; Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 266, 36 L. Ed. 963, 967, 13 Sup. Ct. Rep. 90; Bacon v. Texas, 163 U. S. 207, 216, 41 L. Ed. 132, 136, 16 Sup. Ct. Rep. 1023; New Orleans Waterworks Co. v. New Orleans, 164 U. S. 471, 41 L. Ed. 518, 17 Sup. Ct. Rep. 161.

"Where a contract for a supply of water is innocuous in itself, and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it."

That a city if authorized by the legislature, in the absence of limitations in the state Constitution on the legislative power, could validly stipulate in a contract for a supply of water that the existing rates should not be reduced by the municipality during the contract period, was expressly adjudged in the recent case of Los Angeles v. Los Angeles City Water Co. (1900) 177 U. S. 558, 44 L. Ed. 886, 20 Sup. Ct. Rep. 736. Indeed, in that case, at the time the contract was made, the city was without authority to make it, but, inasmuch as subsequently its action had been ratified by legislative enactment, the effect of such ratification was held to be equivalent to a prior original grant. But I need not further pursue this aspect of the case, since, as I understand the opinion of the court, it does not sanction the theory adopted by the supreme court of Illinois on this subject, and hence does not, therefore, in terms overrule the principle so firmly settled by the previous decisions of this court, that the subject-matter of a water supply may be contracted for a definite time, and that, when so contracted for, the obligations of the contract are protected from impairment by the Constitution of the United States.

That in the present case some authority was delegated by the legislature to the municipality to contract for water is unquestioned, and it is also undisputed that under the right thus conferred the municipality acted in making the contract which is now in controversy. The issue which, then, arises, is simply this, Did the authority conferred by the legislature upon the municipality authorize it to contract, and in doing so to fix the rates to be paid for such supply during the time stated? Of course, an answer to this question involves an analysis of the statutes of Illinois under which the authority to make the asserted contract arises.

Before approaching the text of the statutes it is well to state the scope of the duty which devolves upon this court in determining whether there was a contract, and the principles which must control in doing so. It is elementary, that where a contract is asserted to have been impaired by subsequent state legislation, this court is constrained to form an independent judgment as to the existence of the contract and its terms. It is equally true that where the contract originates from a state statute, if, in the exercise of an independent judgment,

the existence or nature of the contract becomes balanced in doubt, such doubt will be resolved in favor of the construction given to the state statute by the court of last resort of the state. But this qualification is not a limitation upon the duty to form an independent judgment, and does not imply that, because the statute has been construed against the contract by the state court, therefore the matter is "balanced in doubt." If the rule did so imply, it would follow that in every case where a right arose from a state statute, and the court below held there was no contract, the review of that question in this court would be wholly nugatory, since the decision below would engender the doubt, and where doubt arose the decision of the state court would have to be followed. The rule, then, to be applied when the matter is balanced in doubt, is this, and nothing more, that if in using its independent judgment as it is its duty to do, a serious doubt arises in the mind of the court, then the interpretation by the state court, acting upon a serious doubt created by the exercise of independent judgment, will cause such judgment to preponderate in favor of the construction given by the state court to its own statute. New Orleans Bd. of Liquidation v. Louisiana, 179 U. S. 622, 638, 45 L. Ed. —, 21 Sup. Ct. Rep. 263.

It is unquestioned also that where a right asserted, if enforced, will put a contractual limitation upon the power of the lawmaking authority of a state, presumably to be exercised for the public benefit, doubt is to be resolved in favor of the continued existence of the lawmaking power. In other words, that no contract limitation on the powers of government can be upheld by mere implication, or sustained if there be doubt on the subject. The existence of such a contract limitation must arise clearly and by express intendment.

Bearing these principles in mind, I come to consider the legislative acts by which it is asserted the contract in question arose. Whilst it is quite clear to my mind that the powers conferred by the respective statutes were to be exerted under different circumstances, and that the contract which is here in question came more especially within the scope of the act approved April 10, 1872, I shall not stop to discuss this view, since, whether the statutes be treated separately or together, they fully authorize the contract. Under this view I first approach the consideration of the act of April 9, 1872. Its language is that in all cities and villages where waterworks may hereafter be constructed, the city or village authorities "may contract . . . for a supply of water for public use for a period not exceeding thirty years." And the 2d section conferred upon a municipality so contracting power to levy taxes "to pay for the water so supplied." Clearly, authority is expressly conferred to contract for a supply for the period stated. The argument is that this right to contract for the water for the period of thirty years did not include the power to agree upon the sum to be paid for it for that period. In

other words, the contention is that the right to contract for the purchase existed for the stated period without the power to fix the price, which was an inseparable and necessary concomitant of the right itself. This inevitably follows, since the contract for the supply for a fixed time, and the payment to be made for it, are one and each the correlative of the other. That the statute contemplated that the contract should include the price to be paid is manifestly the result of the 2d section, which confers upon the municipality the right to raise by taxation the money to pay the sum stipulated. Upon the hypothesis that the power to contract for the supply for thirty years did not include the agreement to pay for the supply during the stated period, the 2d section of the act would become wholly superfluous. Indeed, the theory of construction which excludes the rates from the power to contract for the period specified would render the whole act meaningless. Undoubtedly, if waterworks existed and use was made of the streets of the city by the owner of the works, in the absence of contract the power to compel the furnishing of water at just and reasonable rates would exist by operation of law. It follows that the statute should not be construed as merely authorizing the doing of that which could have been done without its passage, but must in reason be held to have empowered the obtaining of a water supply and facilities by way of extension of the water system, free water for certain public purposes and fire protection and all the other incidents to such contract, for the period named and at the rates to be agreed upon for such period. The same view obtains from considering the provisions of the 1st section of article 10 of the act of April 10, 1872. By this section municipal authorities were authorized to provide for a supply of water by constructing municipal waterworks, or to accomplish the same purpose by authorizing "any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance and for a period not exceeding thirty years." There was here an express delegation of authority to municipalities, if they did not wish to assume the burden of constructing their own waterworks, to contract with an individual or private corporation to construct and maintain them at "such rates as may be fixed by ordinance and for a period not exceeding thirty years." My mind fails to perceive how language could more directly and positively confer the authority to contract for the supply and agree as to the rates to be paid therefor for a period of thirty years. Adopting the most technical rules of construction, I do not understand how the words, "at such rates as may be fixed by ordinance and for a period not exceeding thirty years," can be construed as relating to the construction and maintenance of the works for that period, and not to the sum to be paid for the supply for the same length of time. The view adopted by the court below was that the words, "at such rates as may be fixed by ordi-

nance," can be taken out of the text and be treated as following, and not as preceding, the words, "and for a period not exceeding thirty years." But this, as I understand it, instead of construing the statute, would be the equivalent of writing a new one. Obviously, whilst the statute authorized a contract for a supply and the rates to be paid therefor, it contemplated that the rates must in the nature of things be fixed by the passage of an ordinance to be embodied in the contract, and therefore the words, "may be fixed by ordinance," were inserted. In other words, in order to insure under the contract the rates to be agreed upon, it provided that by ordinance these rates should be fixed for the designated period. Both laws, as I have stated, went into effect on the same day, but whilst relating to cognate subjects, contemplated the exercise of the power conferred as a result of somewhat different conditions. The one, the law approved April 9, had in view a contract for a water supply to be made where waterworks were established, and conferred the authority to contract for such supply under such circumstances, and to fix the price to be paid for the supply for the contract term specified in the statute. The other, the law approved April 10, 1872, authorized a contract to procure the construction of waterworks, and also, in doing so, to fix the rates for the definite period which that statute likewise enumerated. To construe the words, "may be fixed by ordinance and for a period not exceeding thirty years," as found in the statute as a legislative prohibition on the municipality to fix rates for the period stated in the law, is but to say that the power to contract and fix the rates for the definite time was at one and the same identical moment both given and prohibited.

But the construction adopted below and now maintained by the court, as I understand it, leads yet further. As the words, "may be fixed by ordinance and for a period not exceeding thirty years," are not found in the law authorizing a contract for water supply where waterworks were established when the agreement was made, they cannot be applied to such a contract. The following, then, is the inevitable result of the construction given to the statutes: The power to contract and fix rates for a definite time was conferred in the case where such a contract was made with an established water company. This power, however, was not given, but was expressly prohibited, where the purpose of the contract was to procure the building of waterworks and the purchase of a supply of water to be furnished from the works when constructed. This is but to say that where municipalities were legally entitled to secure the water supply without the necessity for a contract, and at reasonable rates, they were unauthorized to contract for a definite time and at rates to be fixed for that period. But in the case where municipalities had no such power (for they could not, of course, compel an individual or corporation to undertake the expense of erecting

waterworks), the power to fix rates for a definite period was absolutely prohibited. In other words, the power was conferred to contract for the supply and fix the price for a definite time where it was not at all needed, and it was absolutely forbidden in the case where in the nature of things such a power was essential. Considering the statutes separately, no doubt whatever, then, arises in my mind as to their import. When they are construed in pari materia this conclusion becomes to me an absolute conviction. This must be the result, since it is impossible, in reason, to hold that, if the meaning of each statute is plain when considered separately the significance of each disappears when they are considered together.

The contract as executed, beyond peradventure, expressly fixed the rates for the term for which it was agreed the supply should be furnished. It imposed, moreover, upon the water company duties to construct and extend the works, which could only arise from contract, and which cannot reasonably be assumed to have been entered into but upon the basis of an agreed compensation. The obligations on the water company were not simply to furnish a supply of water in accordance with the capacity of the plant existing at the inception of the contract, or provided for therein, but the company came under the duty of largely extending its plant at the discretion of the municipality during the statutory period covered by the contract. The company, moreover, agreed to furnish a large volume of water during the same period without charge. It is inconceivable that all these obligations would have been assumed upon the hypothesis that they were to be performed during the thirty years without any previous understanding or agreement as to the payment to be made during the same time.

Various authorities are cited in the opinion of the court below, and were referred to in argument, upon the theory that they support the contention that where authority is given to contract for a supply of water for a fixed period, this power to contract does not, as a necessary incident, import authority to also agree upon the rates for the same period. In other words, the authorities cited, it is contended, separate the inseparable.

All the authorities cited are excerpted in the margin.*

*Carlyle *v.* Carlyle Water, Light & Power Co., 52 Ill. App. 577; East St. Louis *v.* East St. Louis Gaslight & Coke Co., 98 Ill. 415, 38 Am. Rep. 97; Millikin *v.* Edgar County, 142 Ill. 528, 18 L. R. A. 447, 32 N. E. 493; Gale *v.* Kalamazoo, 23 Mich. 354, 9 Am. Rep. 80; Des Moines Waterworks Co. *v.* Des Moines, 95 Iowa, 357; Spring Valley Waterworks *v.* Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48; State *ex rel.* Atty. Gen. *v.* Columbus Gaslight & Coke Co., 34 Ohio St. 572, 32 Am. Rep. 390; Zanesville *v.* Zanesville Gaslight Co., 47 Ohio St. 1, 23 N. E. 55; Greenhood, Pub. Pol. p. 317; Cooley, Const. Lim. p. 206, 1 Dill. Mun. Corp. § 443.

I do not pause to analyze them, contenting myself with the statement that not a single one of them, except the decision of a lower appellate court in Illinois, rendered subsequent to the execution of the contract here considered, has any relation to the proposition which they are cited to maintain. They all proceed upon the theory that where authority is given to a municipality or official board to contract, without any specification of the time, the municipality or board can contract only for a reasonable period, to be determined usually by the tenure of office of the official board. That is, in the absence of a specification of time in the statute, a limit is to be implied resulting from the nature of the functions of the officials by whom the contract is made. I cannot conceive upon what principle these authorities are held to control a case where in the statute conferring authority the time was expressly fixed. Indeed, the decisions in Illinois (among them not only the cases cited below, but others which were referred to in those cases), which are now relied upon to sustain the proposition that a power to contract for a supply of a commodity or the services of an individual does not include the authority to agree upon the compensation to be paid, actually refute the contention which it is alleged they sustain. Thus, in Millikin v. Edgar County, 142 Ill. 528, 18 L. R. A. 447, 32 N. E. 493; Davis v. School Directors, 92 Ill. 294; and Stevenson v. School Directors, 87 Ill. 255, though it was held, from a consideration of co-related statutes, that where authority was conferred upon statutory boards to employ individuals to render public services, but no period was mentioned in the statute for the duration of such hiring, a contract of hiring might only lawfully be made for the current year, it was conceded that the power existed, as a necessary result of the right to contract, to fix the compensation for such period. These cases demonstrate the unsoundness of the contention, here asserted, that the contract under consideration should be dismembered by disassociating the right to fix rates from the authority to contract for the period authorized by statute, and they also, in my opinion, refute the assumption that because the statute gave express power to fix rates by ordinance, thereby there did or could arise a limitation on the authority to contract for the price for the term for which the contract was authorized.

The contract in its entirety being, then, valid, the question which arises is, Did the power to destroy the contract arise from the reservation contained in the general private incorporation law?

In considering this question it must be borne in mind that there was no reservation whatever of the power to repeal, alter, or amend contained in the law regulating public corporations, nor was such a reservation found in the Constitution of the state. The power conferred upon municipalities to contract for a supply of water or for the construction of water-

works authorized them to contract with individuals as well as corporations, and in this particular instance the contract was made with an individual. It is clear, then, that any reservation in the private incorporation act would not have acted upon the contract for the supply of water if that contract had remained in the hands of an individual. To hold, then, that the provision of the 9th section of the law regulating private corporations, which reserved to the general assembly the power to prescribe such regulations and provisions as it might deem advisable as to such corporations, retained the power to abrogate a contract like the one here involved, would import that, although there was no reservation whatever to abrogate or change the contracts as to water supply, made by a municipal corporation, the private incorporation law was intended to deprive private corporations of the power to contract with municipal corporations as to water supply. That is to say, that public corporations were fully authorized to make irrevocable contracts, but such agreements became revocable when a private corporation was the other contracting party. But, aside from these considerations, the views of the contract which I have already expressed, to my mind clearly demonstrate the inapplicability of the reservation relied upon. The reservation, as I have shown, went into effect on the same day as did the laws which expressly and specifically authorized the making, by municipal corporations, of a contract for a supply of water for a designated period with individuals or corporations. The statutes having gone into effect upon the same day, it would be beyond reason to construe the mere reservation of the legislative right to regulate private corporations as abrogating and destroying the express legislative authority to contract for a supply of water for a specified and definite period. To do so would be, by a mere implication, in effect to repeal and set aside the express authority conferred by the statutes, and would amount to holding that the authority had been conferred in the one breath and had been retracted in the other.

Indeed, the statute of 1891 which conferred the power to regulate water rates—under the authority of which the ordinance here complained of reducing the rates was passed—shows on its face that it was not enacted under the authority to regulate private corporations, but upon the supposed existence in the legislature of a common-law right to fix rates, any contract to the contrary notwithstanding. This will become manifest when it is observed that the statute in question authorized municipalities to fix the rates for the supply of water, whether furnished by private individuals or corporations.

Although no reference was made to it in the opinion below, it is suggested in argument that, as there was a provision in the Constitution of the state of Illinois forbidding a grant of exclusive privileges, therefore the contract here considered

was void because, it is asserted, such contract expressly conferred an exclusive right and privilege. It is, however, settled that the mere making of a contract for a water supply for a definite time and the fixing of rates for such time, accompanied with an obligation that the municipality itself would not construct waterworks for such period, does not amount to a grant of an exclusive privilege. Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 14, 17, 43 L. Ed. 341, 347, 348, 19 Sup. Ct. Rep. 77. This being beyond question, it clearly follows that, even upon the hypothesis that the contract in this case contained an express or implied stipulation that the city would not grant to anyone else the right to use the streets of the city for the purposes of a waterwork system during the life of the contract, the stipulation for such exclusive right, and not the contract, would come within the inhibition of the provision of the Constitution. We say this arguendo only, as the controversy here presented involves the validity of the contract in so far as it affected the supply for public use and fixed the rates of such supply during the period stated.

In my opinion, the contract having been expressly authorized for a definite period, the rates agreed upon could not, during the term of the contract, be changed without violating the contract clause of the Constitution of the United States; and I therefore dissent from the judgment holding otherwise.

DANVILLE WATER COMPANY, Plff. in Err.,

v.

CITY OF DANVILLE.

(*Submitted November 12, 1900. Decided March 25, 1901.*)

[21 Sup. Ct. Rep. 505.]

*This case follows the decision in the case preceding.

In Error to the Supreme Court of the State of Illinois to review a decision affirming a judgment for defendant on demurrer to pleas in an action by a water company against a city for the rental of fire hydrants. Affirmed.

See same case below, 180 Ill. 235, 54 N. E. 224.

The facts are stated in the opinion.

Messrs. Alexander Pope Humphrey and William W. Davies for plaintiff in error.

Messrs. G. F. Rearick and John H. Lewman for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

The parties to this action were respectively plaintiff and

*Ante, p. 613.

defendant in the courts of the state, and we will so denominate them. The plaintiff is a private corporation, and the defendant is a municipal corporation organized and existing under the general laws of the state. The action was brought by the plaintiff to recover the sum of $5,000, alleged to be due for the rental of certain fire hydrants.

The cause of action relied on is based on an ordinance passed on the 9th of November, 1882, by the defendant, granting the plaintiff the privilege of constructing and maintaining waterworks for supplying the city of Danville, Illinois, with water. The ordinance provided in detail for the character of the works and the supply, the rates to consumers, whether furnished by meter or otherwise, and the purchase by defendant of the works at the expiration of five, ten, and twenty years, and at the expiration of thirty years of any renewed term.

Section 8 and section 14 are respectively as follows:

"In consideration of the benefits which will be derived by the said city and its inhabitants from the construction and operation of the said waterworks, and in further consideration of the water supply hereby secured for public uses, and as the inducement to said water company to accept the provisions of this ordinance and contract, and to enter upon the construction of said waterworks, the rights and privileges hereby granted to and vested in said water company shall remain in force and effect for thirty years from the passage of this ordinance; and for the same consideration and as the same inducement the city of Danville hereby rents of the Danville Water Company, for the uses hereinafter stated, 100 fire hydrants of the character hereinafter described, and for and during the term of thirty years from passage of this ordinance, and agrees to locate them promptly along the line of the street mains, on demand of said water company, and on submission by it to said city of a plan of the location of said street mains, and agrees to use the said hydrants carefully and to pay said water company for any injury which may happen to any of them when used by any officer, servant, or member of the fire department of said city, and agrees to pay rent for said 100 hydrants at the rate of $75 each per year, and agrees to pay during the unexpired term of said ordinance and privilege, for any additional fire hydrants which city may hereafter locate at the rate of sixty-two and fifty one-hundreths dollars each, per year, for the next forty additional hydrants, and for all fire hydrants in excess of 140 at the rate of $50 each, per year; all of which sum shall be paid by said city to said water company, beginning from the dates when each of such hydrants shall be put into successful operation, in quarter-yearly instalments on the 1st day of February, May, August, and November of each year, and terminating upon the expiration of said term of thirty years, or upon the purchase of said works and their privileges and property by the said city.

"This ordinance shall become binding as a contract on the said city of Danville in the event that the said Danville Water Company shall, within ten days from the passage and publication of this ordinance, file with the city clerk of said city its written acceptance of the terms, obligations, and conditions of this ordinance, and upon such acceptance this ordinance shall constitute the contract, and shall be the measure of the rights and liabilities of the said city and the said water company."

The acceptance was duly filed by plaintiff. On the 1st of May, 1883, another ordinance was passed amending the first ordinance, for the construction of the works, the streets where the mains should be laid, and the place where the fire hydrants should be put, and how constructed.

Section 2 provided as follows:

"This ordinance shall become binding as a part of the contract existing between the city of Danville and the Danville Water Company in the event that said water company shall, within ten days from the passage and publication of this ordinance, file with the city clerk of said city its written acceptance of it."

Between the 8th of June, 1883, and the 18th of October, 1894, twelve other ordinances were passed, requiring the extension of the mains of the water system to other streets and the erection of fifty-seven additional fire hydrants; all of the ordinances were declared binding as contracts upon acceptance by the plaintiff, and all were accepted. The rental of the hydrants was fixed, as to some of them at $62.50 per annum, and others at $50 and $40 per annum. In the ordinance fixing the latter sums it was provided that nothing therein should "operate to affect in any way any of the provisions of the ordinance heretofore passed by said city relative to the Danville Water Company, except to the extent of the reduction of the rental of the additional hydrants therein provided and hydrants thereafter to be provided."

There was an allegation that plaintiff did all things required of it in the construction of the system, and put in all mains and hydrants and kept them supplied with water.

The pleas of the defendant admitted that the sum of $1,930 was due, but denied liability for anything over that sum, because the rental for the hydrants had been reduced by an ordinance passed by the city January 17, 1895, which was entitled "An Ordinance Prescribing the Maximum Rates and Charges for the Supply of Water Furnished by the Danville Water Company of the City of Danville." The ordinance recited that after a careful comparison of water rates and charges in other cities it was found that those of the Danville company were "unjust, excessive, and unreasonable." And that whereas under the act of the state approved June 6, 1891, and in force July 1, 1891, and under "other fully competent and complete legal authority," the city was empowered to prescribe

the ordinance maximum rates for water furnished by the Danville company; and whereas, after full investigation the members of the council believed the rates prescribed were just and reasonable, a schedule or scale of rates was ordained to take effect on the 1st of May, 1895. The rental of fire hydrants was reduced for the first 140 to a uniform rate of $50 per annum; for all others then rented and others which should be rented, $40 per annum. For certain uses of water which had been theretofore furnished free by the plaintiff a rate was fixed, to be paid by the city. Provision was made for the appearance by the city attorney if the plaintiff should desire to apply to the circuit court of the county for a review of the rates.

There was an allegation of notice of the passage of the ordinance to the plaintiff, and the prior ordinances under which plaintiff claimed an irrevocable contract were at the time of the passage of said ordinances in excess of a reasonable compensation for the water supplied, and were at the time of suit "unjust, unreasonable, and excessive."

The plaintiff demurred to each of the defendant's pleas, and the demurrer was sustained. The defendant asked that the demurrer be carried back to the declaration, and elected to stand by its pleas. Judgment was entered for the plaintiff in the sum of $2,701, motion to arrest, which was denied, and the case was then taken to the supreme court of the state, by which court the judgment was reversed, and the cause was remanded for further proceedings in accordance with the views expressed in the opinion filed in the cause.

On the return of the case to the circuit court the defendant by leave of the court filed additional pleas, to which a demurrer was sustained. With this action of the court we have no concern.

In accordance with the opinion of the supreme court of the state the demurrer of the plaintiff was overruled as to the first and second pleas of the defendant, and sustained as to the third. The plaintiff elected to stand by its demurrer, and judgment was entered for the sum of $1,930 and costs of all suit. On appeal to the supreme court it was sustained, the court expressing the following opinion:

"This case has practically been before us on two former occasions, the parties then being reversed.

"Counsel for appellant concedes the judgment from which this appeal is taken is in exact conformity with the judgments and opinions in the former cases, and that no new question or matter has intervened since the former hearings here. Manifestly the only purpose of this appeal is to obtain a final judgment in this court to enable appellant to take a further appeal, if it should desire to do so.

"Adhering, as we do, to the reasoning and conclusions announced in Danville v. Danville Water Co., 178 Ill. 299, 53

N. E. 118, and Same v. Same, 180 Ill. 235, 54 N. E. 224, on the authority of these cases this judgment will be affirmed."

The chief justice of the state allowed this writ of error.

The questions presented by this record are the same passed on in Freeport Water Co. v. Freeport, 180 U. S. —, ante, p. 493, 21 Sup. Ct. Rep. 493, and depend upon the same statutes. Upon the authority of that case the judgment of the Supreme Court of Illinois is affirmed.

Mr. Justice White, with whom concur Mr. Justice Brewer, Mr. Justice Brown, and Mr. Justice Peckham, dissenting:

It will be seen from the opinion of the court that this case differs in no material particular from that of the Freeport Water Co. v. Freeport, just decided, 180 U. S. —, ante, p. 493, 21 Sup. Ct. Rep. 493. Under the sanction of the same statutes considered in the Freeport Case, the defendant in error, the city of Danville, contracted with the plaintiff in error, the water company, for the period authorized by the statute, and stipulated as to the rates to be paid for a public water supply. These rates were adhered to until, under the authority of the statute of the state of Illinois passed in 1891, referred to in the opinion in the Freeport Case, the defendant in error reduced the rates below the contract price. It now asserts in this record that it possessed the power to do so.

For the reasons stated by me for dissenting from the opinion and decree in the Freeport Case, I dissent from the opinion and decree in the present case.

PERRETTE

v.

CITY OF KANSAS CITY.

(*Supreme Court of Missouri, Division No. 2, March 26, 1901.*)

[62 S. W. Rep. 448.]

Streets and Sidewalks—Evidence of Want of Repair—Presumption of Safety.—Where the evidence of plaintiff, suing for injuries received from a defective sidewalk, was that, though he had passed the place twice a day, and it was in "pretty bad shape," yet he did not know it was so bad, and it appeared all right at the place of the injury, and he did not know anything to the contrary until he stepped upon it, he still was entitled to an instruction that he had a right to presume that the sidewalk was in a condition reasonably safe for the use of the public.

Instructions—Sufficiency.—An instruction in a personal injury case is not defective in failing to require the exercise of ordinary care by plaintiff, where in other instructions such care is made a condition of recovery.

Streets and Sidewalks—Duty of Pedestrian—Presumption of Safety.—The law does not require a pedestrian to look for defects in a sidewalk,

but, in the absence of knowledge of its dangerous condition, he has a right to assume that it is reasonably safe for traveling.

Evidence—Admissibility.—Plaintiff testified that he was a drinking man, but never got drunk, and was not a regular drinker. *Held* not to justify a question, on cross-examination of plaintiff's witness, whether the habit of drinking constantly had a tendency to decrease plaintiff's life expectancy.

Same—Same.—One not qualified to testify as an expert cannot give evidence of life expectancy depending upon habits of drinking.

Injury to Pedestrian—Knowledge of Defect—Contributory Negligence.*—That plaintiff knew of the defective condition of a sidewalk, and was injured in broad daylight by stepping on a defective plank, while there were no confusing or distracting occurrences calculated to throw him off his guard and prevent him from exercising his knowledge of such defective condition, do not show contributory negligence *per se*.

Instructions—Using Plaintiff's Knowledge of Defect in Argument.—An instruction, in an action for injuries from a defective sidewalk, that if plaintiff knew that the sidewalk was out of repair the jury could take that fact into consideration in determining whether he was negligent, but that such knowledge would not be a defense unless the defect of which plaintiff knew was such as to render the walk necessarily dangerous to a person ordinarily careful, did not preclude defendant from utilizing in argument before the jury the knowledge of plaintiff that the sidewalk was "in pretty bad shape all the time."

Same—When Not Prejudicial.—An instruction, in an action for injuries from a defective sidewalk, that plaintiff's knowledge of the condition of the walk was no defense unless the defect was such as to render it necessarily dangerous "to a person ordinarily careful," is not prejudicially erroneous, in failing to insert the word "prudent" before "person ordinarily careful."

Same—Same.—The admission of testimony of a physician that his charge for services to plaintiff was a certain sum, without stating whether it was reasonable, was not prejudicial error; plaintiff remitting said sum from the judgment.

Same—Rejection.—A requested instruction covered by one given was properly refused.

Damages—When Not Excessive.—Plaintiff stepped into a hole in a sidewalk, breaking his leg. The ligaments of his foot and ankle were sprained and lacerated, and the bones dislocated. The swelling was so great that a plaster of Paris cast could not be put on, and the member became so inflamed that gangrene ensued, and plaintiff was compelled to keep his foot in ice water four or five days, suffering intense pain and being unable to sleep. A cast was afterwards applied, which remained on 40 days, and plaintiff was confined to his bed 90 days, suffering constant pain. Owing to the tearing loose of the ligaments and displacement of the heel bone, the axis of the foot and ankle became perverted, and the arch of the foot was destroyed; and up to the time of the trial, nearly 14 months, plaintiff had not been able to stand, and physicians testified that this condition was permanent. Plaintiff was a strong,

*See Taylor *v.* Mankato, 4 Mun. Corp. Cas. 680, and Cloney *v.* Kalamazoo, 4 Mun. Corp. Cas. 640, and *notes*, p. 648.

Perrette *v.* City of Kansas City

healthy man, 49 years old, and earned about $21 a week before the injury, but was unable to earn anything up to the time of the trial, as his work required him to stand on his feet. *Held*, that a verdict of $5,000 was not excessive.

Appeal from circuit court, Jackson county; J. H. Slover, Judge.

Action by August Perrette against the city of Kansas City. From a judgment for plaintiff, defendant appeals. Affirmed.

R. B. Middlebrook, for appellant.

Ward & Hadley and Gilmore & Brown, for respondent.

Burgess, J. This is an action by plaintiff for $10,000 damages for personal injuries sustained by him by reason of the alleged negligence of defendant in failing to keep its sidewalk in front of 1809 Holly street, in said city, in a reasonably safe condition for pedestrians, in consequence of which he caught his foot in a hole therein and was injured. The injury occurred about 4 o'clock in the afternoon of August 26, 1896, while plaintiff was returning to his home from a business errand. He lived at that time, and had for about four months prior thereto, at 1847 Holly street, which runs north and south. The sidewalk was made of boards. An iron pipe connected with the waterworks plant of defendant city stood near the middle of this walk, in front of 1809 on said street; the top of the pipe standing a little above the level of the walk. Around this iron pipe there was a small excavation, about a foot deep, over which the boards of the walk were so laid as to leave an open space of about 3½ inches between the end of the board on the west side of said pipe, which was loose at its outer and western end, and so insecurely nailed down that, when stepped upon at the end next to the pipe, it would drop down into the excavation around the pipe. While plaintiff was walking along on the sidewalk at the time of the accident he stepped with his right foot on the loose plank just to the west of the water plug, and the plank went down with him, his foot was caught in the hole, and he was thrown down upon the walk, and his leg broken, the ligaments of his foot and ankle sprained and lacerated, and the bones of his foot and ankle dislocated. Bandages and splints were first applied, the swelling being so great that a plaster of Paris cast could not be put on. The inflammation around the injured parts became so great in a few days that gangrene set in, and plaintiff was compelled to keep his foot in ice water four or five days, during which time he suffered intense pain and was unable to secure any sleep, except under the influence of opiates. A plaster of Paris cast was afterwards applied, which remained on about 40 days, and plaintiff was altogether confined to his bed 90 days, suffering constant pain and inability to sleep; the first time that he left his home after the injury being when, with the aid of crutches and an attendant, he got

to a buggy and was driven to the place of registration to register for the fall election. At the time of the injury plaintiff was conducting a machine shop in Kansas City, being one of the four die makers in the city. Since opening a shop of his own, his average earnings had been about $21 a week. From the time of his injury up to the time of the trial, nearly 14 months, he had not been able to make anything, as the condition of his foot and ankle had been such that he could not stand, and in working at his trade it was necessary for him to stand on his feet. The reason of this result seems to have been, according to the testimony of the physicians, largely due to the tearing loose of the ligaments and to the displacing of the heel bone where it unites with the bones of the foot. This had caused the axis of the foot and ankle to become perverted, the ankle to give way or turn out, and the arch of the foot to be destroyed, making the foot a "flat foot." According to the testimony of the three physicians who treated and examined the plaintiff, this condition was a permanent one. At the time plaintiff was injured he was 49 years old, and had always been a strong man.

At the instance of plaintiff, and over the objection and exception of defendant, the court instructed the jury as follows: "(1) The court instructs the jury that it was the duty of defendant, Kansas City, to keep the sidewalk on the east side of Holly street, between Eighteenth and Nineteenth streets of said city, in a condition reasonably safe for the use of the public, and that plaintiff had the right to presume that this duty had been performed. (2) The court instructs the jury that if you find from the evidence that the sidewalk on the east side of Holly street, between Eighteenth and Nineteenth streets, and in front of the building known as '1809–1813 Holly Street,' of said Kansas City, was on the 26th day of August, 1896, in an unsafe and dangerous condition for travel thereon by the public, and that a sufficient time had elapsed between the time said sidewalk became defective, in case you find it was defective, and the time of the injury to plaintiff, for the city, by the exercise of reasonable diligence, to have discovered and repaired said sidewalk prior to the time of the accident, and if you find that the plaintiff, while lawfully traveling along said sidewalk, in the exercise of ordinary care, was thrown and injured by reason of the unsafe and dangerous condition of said sidewalk, then your verdict will be for the plaintiff. (3) The court instructs the jury that the plaintiff is not bound to prove that any officer or agent of the defendant, Kansas City, had actual notice of the condition of the sidewalk in question; but if you find from the evidence that said sidewalk was unsafe and defective, and that the plaintiff was injured by reason of such unsafe and defective condition of said sidewalk, and that a sufficient length of time had elapsed between the time when said sidewalk became defective and the date of the injury to plaintiff for the city,

by the exercise of reasonable diligence, to have discovered and repaired the defect in said sidewalk, then the city was negligent in not discovering and repairing said sidewalk. (4) The court instructs the jury that, if you find as a fact that the plaintiff knew that the sidewalk at the point where he alleges he fell and was injured was out of repair and in bad condition, you may take that fact into consideration in determining whether or not plaintiff was negligent; but such knowledge will not be a defense in this action unless you find that the defect of which the plaintiff knew, if any, was such a defect as to render the walk necessarily dangerous to a person ordinarily careful. (5) The court instructs the jury that if you find for the plaintiff you will assess his damages at such a sum, not exceeding ten thousand dollars, as will be a fair and just recompense for the injury received by him. In fixing the amount of such damages, you will take into consideration the loss of earning capacity of plaintiff, his expenses for medical service and attendance, the nature and extent of physical injuries received, the bodily pain and mental anguish endured, and any and all such damages as it appears from the evidence will reasonably result from said injuries in the future."

The defendant asked the court to instruct the jury as follows: "(1) The court instructs the jury that, under the pleadings and evidence in this case, your verdict should be for the defendant. (2) On behalf of the defendant, Kansas City, the court instructs the jury as follows: In this action the plaintiff seeks to recover damages from the defendant city for injuries which plaintiff alleges in his petition were received by him on August 26, 1896, by falling on a defective sidewalk in front of the building known as 'No. 1809 Holly Street,' in this city. The burden of proof in this case devolves upon the plaintiff, and, before you can return a verdict in his behalf, you must find by a preponderance of the evidence (that is, by the greater weight of the credible testimony) the following facts: First. That the plaintiff was injured by reason of falling upon a defective sidewalk at the place alleged in the petition. Second. You must further find that the defect which caused the injury was such a one as made the sidewalk not in a reasonably safe condition for travel upon it. Third. You must also find that the defect was one that by the exercise of ordinary care could have been discovered by the city officials charged with the supervision of sidewalks. If you find that the defect was a hidden or latent one, so that by the exercise of ordinary care and diligence on the part of said city officials it could not have been discovered, then the plaintiff cannot recover. Fourth. You must also find that the defect had existed for such a length of time that said city officials would have discovered it, and would have had a reasonable time to repair it before the injury occurred, if they had used ordinary care and diligence in the discharge of their duties. (3) The court instructs the jury that the city is not an insurer of

those who walk upon its sidewalks. In other words, because a person is injured by a fall caused by a defect in the sidewalk, it does not necessarily follow that such person is entitled to recover damages from the city. Such person can only recover when the city has been negligent, as defined in instruction No. 2. (4) The court instructs the jury that if you find that at the time the injury was received the plaintiff was not exercising such care and caution as an ordinarily prudent person, under the circumstances, would have exercised in walking along the sidewalk, then the plaintiff cannot recover. (5) At the instance of the defendant, Kansas City, the court instructs the jury that they cannot find for the plaintiff in this cause unless they believe from the evidence that at the time August Perrette, the plaintiff, was injured, he was using ordinary care and prudence. And, in examining into the question as to whether or not he was exercising ordinary care and prudence at the time and place of his injury, you must take into consideration all the facts and circumstances, as shown by the evidence, tending to shed any light on the kind of care used by him at the time of his alleged injury; and, if you believe from the evidence that he was not using ordinary care and prudence to avoid injury, then your verdict must be for Kansas City. (6) If the jury believe from the evidence that Kansas City failed to use ordinary care in keeping the sidewalk in reasonably safe condition, and that the plaintiff, Mr. Perrette, also failed to use ordinary care, in not discovering the condition of the sidewalk, by reason of which failures he was hurt, then the jury must find for the city. (7) At the instance of the defendant, Kansas City, the court instructs the jury that if they believe from the evidence that there was a plank in a defective condition on the east side of Holly street, between Seventeenth street and Eighteenth street, and that said defect consisted in the plank being in a teetering condition, so that it would tip up, and immediately resume its former position after a person stepping on it had taken his foot off; that this condition of the plank was such that its condition would not be observed by the city authorities when in the exercise of ordinary care; and that the plaintiff was injured by stepping on the plank when it was in this condition.—then, even though the jury may believe from the evidence that the plaintiff was injured because of his having stepped on such plank, yet your verdict must be for the defendant, Kansas City." Of the instructions asked by defendant all except the first, sixth, and seventh were given, and to the refusal to give these defendant duly excepted.

The trial resulted in a verdict and judgment for plaintiff for $5,000. In due time defendant presented its motions for new trial and in arrest, which being overruled, it appeals.

The first instruction given on the part of plaintiff is criticised upon the ground that it told the jury that plaintiff had the right to presume that the sidewalk where the alleged accident

occurred was in a condition reasonably safe for the use of the public, in the face of the fact that the plaintiff himself swore positively that he passed over the walk twice a day, morning and evening, at the place in question, and that it was "in pretty bad shape all the time." If plaintiff knew of the unsafe condition of the sidewalk at the point where the accident occurred, he had no right to presume that it was in a condition reasonably safe for the use of the public. Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451; Nixon v. Railroad Co., 141 Mo. 425, 42 S. W. 942. This would be the indulgence of a presumption over an absolute fact, and illogical. But plaintiff testified to the condition of the sidewalk in front of said lot 1809 in a general way; that is, that it was in "pretty bad shape," but that he did not know it was so bad as it was at the point at which he was injured; that it appeared all right around the water plug, and that he did not know anything to the contrary until he stepped upon the end of the plank at that point and it went down with him; and that he had never seen the hole before. And we are of the opinion that under such circumstances the instruction was not erroneous upon that ground. Roe v. Kansas City, 100 Mo. 190, 13 S. W. 404; Skinner v. Stifel, 55 Mo. App. 9; Culverson v. City of Maryville, 67 Mo. App. 343. It is also urged against this instruction that, before according plaintiff the right to presume that the sidewalk was in a reasonably safe condition for travel, it should have required of him the exercise of ordinary care and prudence at the time of the accident; but, when this instruction is read in connection with plaintiff's second, it will be found that the exercise of ordinary care by plaintiff while walking along upon the street at the time of the accident was made a condition to his recovery, and the jury must have found that he was in the exercise of such care, otherwise they could but have found for defendant. It was not necessary that both propositions be contained in the same instruction.

It is asserted that the action of the court in refusing the sixth instruction asked by defendant was reversible error. The argument is that, although defendant may have been guilty of negligence in failing to keep its sidewalk where the accident occurred in a reasonably safe condition for travel, yet, if plaintiff failed to use ordinary care in discovering the condition of the sidewalk, and by reason of such failure he was hurt, he was not entitled to recover. The law, however, did not impose upon plaintiff the duty of looking for defects in the sidewalk, which, in the absence of knowledge of its dangerous condition, he had the right to assume was reasonably safe for travel; hence no error was committed in refusing this instruction.

During the trial one S. R. Park testified in behalf of plaintiff with reference to his life expectancy, which he stated was 21.6 years. Plaintiff had testified that he was a drinking man,

but never got drunk, and was not a regular drinker. And this witness, upon his cross-examination, was asked by defendant if the habit of drinking constantly had a tendency to decrease the expectancy. Upon objection of plaintiff the witness was not permitted to answer the question, and defendant insists that this was error. There was no evidence whatever upon which to predicate such a question. The witness did not state that he was a regular drinker. Upon the contrary, he stated that he was not, and there was no other evidence upon the subject. Moreover, it was not shown that the witness was qualified to testify as an expert in regard to the matter.

Defendant claims that the first instruction asked by it and refused should have been given, and, while conceding that the knowledge by plaintiff of the defective condition of the sidewalk would not of itself ordinarily constitute negligence, as a matter of law, that there were other elements of negligence plainly appearing, namely, that the accident occurred about 4 o'clock on the evening of a bright, sunny day, and a total absence of any confusing or distracting occurrences calculated to throw plaintiff off his guard, and prevent him from exercising the knowledge he possessed of the defective condition of the walk. But these matters were necessarily considered by the jury in passing upon the question as to whether or not plaintiff was exercising such care and caution as an ordinarily prudent person, under the circumstances, would have exercised in walking along the sidewalk, and the effect of their verdict was that he was in the exercise of such care.

It is also insisted that error was committed in giving the fourth instruction on the part of plaintiff. The argument is that by this instruction defendant was precluded from utilizing in any way the knowledge plaintiff acquired, before the jury, that the sidewalk at the place in question was "in pretty bad shape all the time"; but this contention seems to us to be untenable, for how it could have the effect that defendant contends it had, we are unable to conceive. It is further claimed that this instruction is vicious, in that it concludes as follows: "Unless you find that the defect of which the plaintiff knew, if any, was such a defect as to render the walk necessarily dangerous to a person ordinarily careful," when it should have described a "prudent person ordinarily careful." The case of Cohn v. Kansas City, 108 Mo. 392, 18 S. W. 973, was an action against the city for personal injuries sustained by reason of a defective sidewalk; and the court, in the instructions given at the request of the plaintiff, told the jury that the fact that plaintiff knew the condition of the street would not prevent a recovery, "if she used such care in attempting to pass along said street as persons ordinarily use under such circumstances." And in another instruction, given at the instance of the plaintiff, the courts said: "Ordinary care is just such care as a person should ordinarily exercise under like circumstances." The court said: "The court erred in both

of these definitions; for ordinary care is that care which a prudent person ordinarily uses under like circumstances, which is another and different thing from such care as persons ordinarily use under like circumstances." But the case was not reversed upon that ground, nor are we inclined to reverse the judgment in the case in hand because of an error which, to say the most for it, is quite technical, and could not in any way have misled the jury or prejudiced the rights of defendant. Section 865, Rev. St. 1899.

Dr. George Goodman, a physician who treated plaintiff for his injuries, was a witness in his behalf, and stated that his charge therefor was $250, but did not testify as to its reasonableness; and, this being the case, defendant contends that the jury had no right to take into consideration this item in making their verdict, and therefore so much of instruction No. 5 given at plaintiff's request as authorized the jury to take into consideration the plaintiff's expenses for medical service and attendance is erroneous, there being no testimony upon which to base it. A complete answer to this contention is in the fact that the record shows that, after the verdict and judgment were rendered, plaintiff remitted from the judgment "the sum of $250; the same being the amount testified to as fees for the services of physicians and surgeons attending the plaintiff." By this remittitur, nothing is left as a basis for this contention.

A still further contention is that the court erred in refusing the seventh instruction asked by defendant; for if, as claimed, the defect complained of was so extremely latent as the witnesses for the plaintiff (aside from himself) testified it was, then the city was not liable. With respect to this contention it is sufficient to say that this identical question was presented to the jury by the third paragraph of defendant's second instruction, by which the jury were told that, in order to entitle plaintiff to recover, "you must also find that the defect was one that by the exercise of ordinary care could have been discovered by the city officials charged with the supervision of sidewalks. If you find that the defect was a hidden or latent one, so that, by the exercise of ordinary care and diligence on the part of said city officials, it could not have been discovered, then the plaintiff cannot recover." It follows that the instruction was properly refused.

A final contention is that the verdict was excessive. That it is large is true, but when we consider the pain and suffering which plaintiff underwent, and that his injuries are in all probability permanent, and the loss of time occasioned by his injury, the verdict is not so out of line with reason and justice as to shock the conscience and to satisfy the unbiased mind that it was not the result of impartial and unprejudiced deliberation; and under such circumstances this court will not interfere. Hollenbeck v. Railway Co., 141 Mo. 97, 38 S. W. 723, 41 S. W. 887. The judgment is affirmed.

Sherwood, P. J., and Gantt, J., concur.

WILLIAMS

v.

CITY OF WEST BAY CITY.

(*Supreme Court of Michigan, March 26, 1901.*)

[85 N. W. Rep. 458.]

Personal Injuries—Defective Sidewalk—Question for Jury.*—Plaintiff's evidence showed that a flagstone in a sidewalk was broken and partly sunken, making a depression from two to five inches deep, and that while she was traveling along the walk in the evening, when it was raining, she stepped into such depression, and was thrown down and injured. *Held*, that the question whether the walk was reasonably safe and fit for travel was for the jury.

Error to circuit court, Bay county; Nelson Sharpe, Judge.

Action by Susan Williams against the city of West Bay City. From a judgment for plaintiff, defendant appeals. Affirmed.

Lee E. Joslyn, for appellant.

John Golden (James Van Kleeck, of counsel), for appellee.

Moore, J. This case has been here before. It is reported in 119 Mich. 395, 78 N. W. 328. Upon the second trial the plaintiff recovered a verdict of $300. The case is brought here by writ of error. The defendant insisted that under the evidence in the case the sidewalk was shown to be reasonably safe and fit for travel, and the judge should have directed a verdict in favor of defendant; citing Shietart v. City of Detroit, 108 Mich. 309, 66 N. W. 221, and Jackson v. City of Lansing (Mich.) 80 N. W. 8. If a case rested upon the testimony of the witnesses produced upon the part of the defendant, it would have been the duty of the judge to direct a verdict, but it did not. Witnesses were sworn on the part of the plaintiff, who swore that a flagstone in the walk was broken, and that part of it was sunken down, making a depression or "pocket," as some of the witnesses called it, from two to five or six inches deep, and that in the evening, when it was raining, the plaintiff stepped into this depression and was thrown down. If this testimony was true, it cannot be said, as a matter of law, that the walk was reasonably safe and fit for travel.

The case was very carefully tried, and, we think, is free from error. Judgment is affirmed.

The other justices concurred.

*See Augusta *v.* Tharpe, 5 Mun. Corp. Cas. 560, *note*, p. 567.

KEEN

v.

MAYOR, ETC., OF CITY OF HAVRE DE GRACE.

(*Court of Appeals of Maryland, Feb. 21, 1901.*)

[48 Atl. Rep. 444.]

Defective Sidewalk—Negligence of City—Direction of Verdict.*—Plaintiff, on a dark night, stumbled, by reason of a hole in the sidewalk, and fell down an embankment. Plaintiff had no knowledge of the defect, which was in full view and had existed for three weeks. *Held*, that the question of the defendant's negligence in not repairing the defect was for the jury.

Appeal from circuit court, Harford county.

Action by Lycurgus Keen against the mayor and city council of the city of Havre de Grace. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Argued before McSherry, C. J., and Fowler, Briscoe, Boyd, Page, Pearce, Schmucker, and Jones, JJ.

Jas. J. Archer, Fred. R. Williams, and John S. Young, for appellant.

Thos. H. Robinson and P. L. Hopper, for appellee.

Page, J. The court instructed the jury at the close of the plaintiff's testimony that there was no evidence legally sufficient to establish negligence on the part of the defendant, and the correctness of this instruction constitutes the only subject of consideration in this case. The suit was brought to recover damages for injuries alleged to have resulted from the negligence of the defendant. The evidence shows that the plaintiff was walking along the sidewalk of Union avenue, in the city of Havre de Grace, an incorporated town, on a dark night, and while so doing fell into a hole and was injured. The immediate cause of his fall, the plaintiff claims, was the hole in the sidewalk, into which he stepped, whereby he lost his balance and fell down an embankment. The law applicable to a case of this kind is clear. It is not questioned that the city of Havre de Grace has power to grade and repair its streets and sidewalks (Act 1890, c. 180); and when such is the case the municipality is bound to maintain them in safe condition, and if it negligently fails so to do, and thereby persons, acting without negligence on their part, are injured, it is liable to respond in damages for all injuries caused by its

*See Augusta *v.* Tharpe, 5 Mun. Corp. Cas. 560, *note*, p. 567.

neglect. Mayor, etc., v. Marriott, 9 Md. 160; Mayor, etc., v. Pendleton, 15 Md. 17. Before, however, the municipality can be made liable in any case, it must be shown that it had actual or constructive notice of the bad condition of the streets. As was well said in the case of Todd v. City of Troy, 61 N. Y. 509: "By 'constructive notice' is meant such notice as the law imputes from the circumstances of the case. It is the duty of the municipal authorities to exercise an active vigilance over the streets, to see they are kept in a reasonably safe condition for public travel. They cannot fold their arms and shut their eyes, and say they have no notice. After a street has been out of repair, so that the defect has become known and notorious to those traveling the street, and there has been full opportunity for the municipality, through its agents charged with that duty, to learn of its existence and repair it, the law imputes to it notice, and charges it with negligence." If the effect be of such a character as not to be readily observable, express notice to the municipality must be shown. Burns v. City of Bradford, 137 Pa. St. 367, 20 Atl. 997, 11 L. R. A. 726; Cook v. City of Anamosa, 66 Iowa, 430, 23 N. W. 907. But if it be one which the proper officers either had knowledge of, or by the exercise of reasonable care and diligence might have had knowledge of, in time to have remedied it, so as to prevent the injury complained of, then the municipality is liable. Stanton v. Salem, 145 Mass. 479, 14 N. E. 519; Gschwend v. Mellvale Borough, 159 Pa. St. 257, 28 Atl. 139; Mayor, etc., v. Perdue, 53 Ga. 607. If, therefore, the evidence in this case shows that there was a defect in the sidewalk, of which the city had knowledge, or by the exercise of reasonable diligence ought to have known, and the plaintiff, while exercising proper care, stepped into the hole, and was thereby injured, the municipality would be liable for such damages as ensued; further, that, if there is any evidence from which the jury can reasonably so find, the prayer we are now considering should not have been granted. The prayer is to the effect that there is no evidence in the case to establish negligence, on the part of the defendant. Now, negligence is usually a question of fact for the jury. Lewis v. Railroad Co., 38 Md. 588. And it is only where the "facts are undisputed, or where only one reasonable inference can be drawn from them, that the question is one of law for the court." Baltimore & O. R. Co. v. State, 75 Md. 537, 24 Atl. 14. Moreover, a case could not be withdrawn from the jury if there be some reasonable evidence of the existence of facts requisite to fix liability upon the defendant. Baltimore & O. R. Co. v. State, 71 Md. 599, 18 Atl. 969. In view of this statement of the law, it follows that if there had gone to the jury evidence from which the jury could reasonably find that there was a dangerous hole in the sidewalk, of which the defendant had, or ought to have had, knowledge, and that such hole was the proximate cause of the accident, the prayer should not

have been granted. Without discussing the evidence on these points, it is sufficient to state that divers witnesses testify to the existence and character of the hole. Mrs. Suter said she had seen it there for three weeks before the accident; George Carroll, that it had been there, "maybe, a couple of weeks or so"; and John Suter, "two or three weeks." There is further proof that the hole was in the bed of the sidewalk, and not hidden or obscured by anything from the full view of any one who passed along that part of the walk. There was also evidence that the plaintiff passing there on a dark night, without knowledge of the defect, stepped into the hole, and "was thrown backward" and fell into the gutter, and thereby was injured. If the jury believed this testimony, they would unquestionably be justified in finding that the municipality was negligent in not repairing the defect if it, or its proper officers or agents, knew of its existence; and, if they did not have knowledge of its existence, then they did not exercise that active vigilance which was incumbent on them, to see that the sidewalk was kept in a reasonably safe condition for public travel. As this is the only question presented by the record, it follows that the judgment must be reversed, and the cause remanded. Judgment reversed, with costs to the appellant, and new trial ordered.

LAURIE *et al.*

v.

CITY OF BALLARD.

(*Supreme Court of Washington, May 3, 1901.*)

[64 Pac. Rep. 906.]

Defective Sidewalks—Injuries—Negligence—Evidence.—Where plaintiff is injured by falling on a defective sidewalk, evidence of other holes and defects in the sidewalk in the vicinity of the hole which caused the fall is competent on the question of notice to the city of the defective condition of the walk.

Same—Same—Same—Question for Jury.*—Plaintiff was injured by stepping into a hole in a sidewalk, caused by a plank being broken several days before. There were several churches and a school house on the street, and it was much traveled by those attending the churches and schools as well as by those living along the street. The planks of the walk were raised 10 or 12 inches from the ground, and a driveway crossed the walk, where the plank was broken by a loaded wagon. *Held*, that the question of the negligence of the city in not discovering the defect and repairing the walk was for the jury.

Appeal from superior court, King county; E. D. Benson, Judge.

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*See Augusta *v.* Tharpe, 5 Mun. Corp. Cas. 560, and *note*, p. 567.

Laurie *v.* City of Ballard

Action by Laura M. Laurie and her husband against the city of Ballard. From a judgment for plaintiffs, defendant appeals. Affirmed.

I. L. Hyland and Piles, Donworth & Howe, for appellant.

Davis & Gilmore and Ballington, Ronald & Battle, for respondents.

Per Curiam. Respondents are husband and wife, and as such they jointly instituted this suit to recover on account of injuries alleged to have been received by the wife, Laura M. Laurie. On the 10th day of November, 1898, respondents resided in the city of Ballard, and about half past 8 o'clock in the evening of said day Mrs. Laurie, while walking over the sidewalk along Tallman avenue, a public street in said city, stepped through a hole in the sidewalk, and fell in such a manner that it is claimed she received therefrom serious and probably permanent injuries. The hole had been made by the breaking of a plank in the sidewalk. The evening was dark, and there were no guards or signals at or near said broken plank and hole. It is claimed that Mrs. Laurie fell down upon and against the sidewalk with great violence, and that by reason thereof her left foot was sprained, and her left hip bruised; that her left eye and ear were bruised, and permanently injured; and that she was seriously and permanently injured internally. Mrs. Laurie, for sometime prior to said accident, had been engaged in the management of an employment agency in the city of Ballard. It is claimed that respondents are damaged in the sum of $600 for the loss of Mrs. Laurie's time and labor, $810 for the husband's time and that of other nurses in nursing and caring for the wife, $500 for medicines and medical attendance, together with general damages for injuries in body and mind; making a total of $15,000, for which sum respondents ask judgment. A trial was had before a jury, and, when the evidence had all been introduced, appellant's counsel challenged the sufficiency of the evidence, and moved the court that the case be withdrawn from the jury, and judgment rendered for appellant. The challenge and motion were denied, and the court thereupon submitted the case to the jury under instructions. A verdict was returned in favor of respondents in the sum of $1,887.50, and judgment was thereafter rendered against appellant for that sum. A new trial was not asked in the lower court, and it is not asked here. Appellant assigns as error: (1) The refusal of the court to sustain its challenge to the sufficiency of the evidence, and its motion that the case be withdrawn from the jury, and judgment rendered for the defendant; (2) the refusal of the court to instruct the jury to render a verdict for defendant, as requested by the defendant; (3) the ruling of the court during the trial to the effect that testimony as to the existence of other holes in the side-

Case Stated.

walk in that vicinity was admissible as evidence against the defendant.

We will first discuss the last assignment of error, inasmuch as it challenges the competency of much evidence that went to the jury. It is urged by appellant that any evidence concerning the condition of the sidewalk at any point other than the one where the injury was received is totally inadmissible. Upon the other hand, the respondents urge that it is proper to admit testimony of other defects of long standing and in close proximity to show notice to the city of the general defective condition of the street, and as having some tendency to show notice of the particular defect involved. Under this theory the court permitted the condition of this sidewalk to be shown upon either side of the hole in question, and in front of the same block. A review of the following cases and others shows that the respondents' theory was, by the several courts, sustained: Osborne v. City of Detroit (C. C.) 32 Fed. 36; Fuller v. Mayor, etc. (Mich.) 52 N. W. 1075; Shaw v. President, etc. (Wis.) 42 N. W. 271; Munger v. City of Waterloo (Iowa) 49 N. W. 1028; Gude v. City of Mankato (Minn.) 15 N. W. 175. In Osborne v. City of Detroit (decided by the United States circuit court, E. D. Michigan) 32 Fed., at page 39 of the opinion, the court says: "The court was, and still is, of the opinion that plaintiff was not confined to proving the condition of the walk at the exact spot where the injury occurred. * * * Of course, there should be reasonable discretion exercised in admitting evidence of the condition of the walk near the accident; but we think, in any case, if it be so near the place of accident that a person examining the walk, or responsible for the condition of the walk in that neighborhood, would be likely also to notice the defect at the spot where the accident occurred, it would be competent." In Shaw v. President, etc. (Wis.) 42 N. W., at page 272 of the opinion, the court says: "Several objections to the admission of testimony were made on behalf of the defendant during the trial, based upon the proposition that it was incompetent for the plaintiff to show any defects in the sidewalk, except at the precise place where the plaintiff was injured. Two rulings upon the subject to which exceptions were duly taken present this proposition for determination. One of these rulings permitted the plaintiff to show the condition of the sidewalk 50 or 60 feet each way from the place of the accident. The other ruling was the admission of evidence of the generally bad condition of the same sidewalk from that place south nearly to the depot. Such testimony was admitted for the purpose of showing constructive notice to the village of the defect in the sidewalk at the place of the injury, there being no proof of actual notice in the case. The proposition upon which the above exceptions are based, to wit, that the plaintiff should have been confined, in her

Defective Sidewalks—Injuries—Negligence—Evidence.

proofs of the condition of the sidewalk, to the place where she was injured, has been negatived by this court in several cases, and is against the great weight of authority elsewhere. The true rule doubtless is that for the purpose of showing constructive notice to the town or municipality of a defect in one of its highways, other defects therein in the vicinity, or the general bad condition of the same street, sidewalk, or bridge, may be shown. The cases holding this rule are very numerous." We think, therefore, that this testimony was admissible as tending to show notice to the city, on the theory that, if the city officials had exercised proper care in the inspection of the street, they would have discovered the particular defect. The court limited the testimony to the same block, and we think this was not unreasonable. It is contended by appellant's counsel, however, that the rule should not apply here, because, as they allege, the hole in question had been in existence but three or four days prior to the accident, and that the exercise of reasonable and ordinary care in examination for general defects would not have led to the discovery of this particular defect within so short a time. There is much conflict in the testimony as to the length of time a hole had existed there. A number of witnesses for the respondents testified that there had been a hole at that particular point for weeks, and some even said for months, prior to the time of the accident. It is, however, we believe, clear from the testimony that, whatever may have been the size of the hole that existed there before, the plank at that point was broken by the wheel of a loaded wagon, which passed over it a few days before the accident. This time is variously estimated by the witnesses, ranging from three or four days to a week. The evidence shows that an approach or a driveway had been constructed by some one for the purpose of driving across the sidewalk at this point in order to reach the private inclosure of the adjoining premises, and that a few days before this accident a wagon loaded with wood was driven across it, when one of the wheels broke a plank, and left the hole in the condition it was at the time of the accident. Thus, while the hole was undoubtedly made larger by the action of the wagon wheel within a short time before the accident, yet there is too much conflict in the testimony for this court to assume to say that there was no hole at all there prior to that time which might have called for the attention of the city authorities in the exercise of reasonable care, and which would, therefore, have charged the city with constructive notice under the authorities. It is, in any event, admitted that there was a hole there for three or four days before the accident,—that is to say, from the time it was broken by the wagon wheel; and appellant contends that it cannot be charged with constructive notice in so short a time. No rule can be laid down as to the length of time that must elapse after a defect has existed before a city can be chargea-

ble with constructive notice. The supreme court of Missouri, in Carrington v. City of St. Louis, 89 Mo. 208, 213, 1 S. W. 241, says: "Much depends upon the surroundings in cases of this character, for what might be negligence in not knowing of a dangerous condition of a sidewalk at one locality in the city would not be at another. This walk was much used and resorted to, and that called for increased care on the part of the city." The time which elapsed in the above case was about four hours, and the court held that the evidence was sufficient to justify the court in submitting the question of the city's knowledge of the obstruction to the jury. The above may be said to be an extreme case, as the facts surrounding the case occurred upon one of the much-traveled streets of the city of St. Louis. It serves, however, to illustrate the principle that no arbitrary rule can be adopted by courts as applying to this question of lapse of time in order to charge a municipality with constructive knowledge. The evidence in this case shows that Tallman avenue, in the city of Ballard, is a much-traveled street for a city of that size. One of the public school buildings is located only a short distance from the scene of this accident, and several hundred school children are in daily attendance at said building, many of whom travel upon said street. Several churches are also near, and persons attending services thereat travel along this street, besides the usual and ordinary travel of residents in that locality. We believe, under any view of this question of the lapse of time, that the circumstances of this case were such as justified the court in submitting the matter of negligence to the jury. This is further emphasized by the fact that the evidence shows that the planks of the sidewalk at that point were elevated above the ground at least from 10 to 12 inches, were supported by stringers, and that the aforesaid approach for a wagon driveway lengthwise of said planks had existed for a long time prior to the accident. We think it was proper for the jury to consider whether the existence of that driveway, under the circumstances, called for greater vigilance on the part of the city in watching for defects at that particular place than it would have been chargeable with had no such driveway existed.

Same—Same—Same—Question for Jury.

Referring again to the matter of the admitted testimony as to other defects than the particular one, we think it is manifest that the jury could not have considered such testimony for any other purpose than that for which the court admitted it. The court gave the following instruction to the jury: "Before you can find for the plaintiff, you must find that the walk in question, at the time and at the particular place of the alleged injury, was so defective and dangerous as not to be reasonably safe for public travel, and that said defect or dangerous condition of the walk at that place had existed for such a length of time, and was so manifest to the senses, that the officers and agents of the city could, with reasonable

diligence, know, or by the exercise of reasonable care would have known, it in time to have remedied the defect before the accident. There is evidence before you as to the location of the hole in which the plaintiff, Mrs. Laurie, is alleged to have received injuries. I charge you that in arriving at your verdict you have no right to find for the plaintiff on account of any negligence of the defendant, if there was any such negligence, in regard to other holes or defects. Unless you find that the defendant was negligent in respect to the particular hole or defect where the plaintiff, Mrs. Laurie, is alleged to have received her injuries, your verdict must be for the defendant." In view of the foregoing instruction, we think no confusion could have existed in the minds of the jury upon this subject. The evidence clearly shows that Mrs. Laurie received injuries from stepping through the hole in the sidewalk, and, for the reason heretofore stated, we think the court properly submitted the question of negligence on the part of the city, and also that of contributory negligence on the part of Mrs. Laurie, to the jury, and that it committed no error in denying appellant's challenge to the evidence and its motion to withdraw the case from the jury. The judgment is therefore affirmed.

LEAHAN

v.

COCHRAN.

(*Supreme Judicial Court of Massachusetts, Suffolk, May 21, 1901.*)

[60 N. E. Rep. 382.]

Action—Notice—Nuisance—Ice—Sidewalk.*—In an action at common law to recover damages caused by ice formed on a sidewalk from water flowing from the gutter of defendant's house, and thereby creating a public nuisance, it is immaterial whether defendant was given the notice specified in Pub. St. c. 52, § 19, providing that the person injured shall give to the person obliged to keep the highway in repair notice of the place and cause of the injury within 30 days thereafter.

Same—Same—Same—No Right to Maintain Can Be Acquired.—Defendant purchased, and thereafter occupied, a house from the gutter of which a spout led to a groove in and crossing the sidewalk. The water flowing through the spout formed ice on the walk, rendering it dangerous to public travel, and causing injury to plaintiff. *Held*, that so maintaining the spout constituted a public nuisance, and defendant was not exonerated by the fact that the conditions existed when she purchased the property, and no previous complaint had been made, since, the nuisance being public, her predecessor could not have acquired a right to maintain it.

*See Reedy v. St. Louis Brewing Ass'n, 5 Mun. Corp. Cas. 573.

Leahan *v.* Cochran

Exceptions from superior court, Suffolk county; Henry N. Sheldon, Judge.

Action between one Leahan and one Cochran. From a judgment for the plaintiff, the defendant brings exceptions. Overruled.

Charles W. Bond, for plaintiff.

G. C. Abbott, for defendant.

Hammond, J. The evidence tended to show that affixed to the house of the defendant was a conductor, constructed and used for the purpose of carrying water from the roof to the public sidewalk adjoining; that there was a groove in the sidewalk, extending from the end of the conductor to the outer edge of the sidewalk; that the water from the conductor had frozen in and about the groove upon the sidewalk; and that the plaintiff, while traveling, in the exercise of due care, over the ice, was injured. The evidence warranted a finding that in the winter the natural and probable result of the situation would be the formation of ice upon the sidewalk, which would be dangerous to public travel, and therefore a public nuisance. At the time of the accident the defendant had been the owner of the house for several years, and there was no evidence that the defendant constructed the building, the conductor, the groove, or the sidewalk; and it appeared that the condition of the conductor at the time of the purchase was, and ever since had been, the same as at the time of the accident. There was no evidence that the defendant ever had been requested by the plaintiff, or by any other person, to reform the nuisance, or that the plaintiff ever complained of it to the defendant. The action is at common law, and the question whether the notice requisite to the maintenance of an action, under Pub. St. c. 52, § 19, was given, is immaterial. It is not argued that the evidence did not warrant a finding that this conductor in its natural operation did create a nuisance in the highway. The only question presented is whether the court erred in declining to give the second and third rulings requested by the defendant. These requests raise the question whether, the situation being the same as at the time of the purchase by the defendant, she can be held answerable to the plaintiff, in the absence of any request made to her to reform the nuisance. There can be no doubt that in the case of a private nuisance the general doctrine in this country, following Penruddock's Case, 5 Coke, 100, is that the grantee of land upon which, at the time of the grant, there exists a nuisance created by his predecessors in title, is not responsible merely because he has become the owner of the land. His liability arises from his knowingly continuing the nuisance; and, generally, it may be stated that he is not answerable for continuing the nuisance in its original state unless he has had notice to abate, or, at least, until he has had knowledge that

it is a nuisance, and injurious to the rights of others; and, while there is some dissent from this doctrine (see opinion of Denio, J., in Brown v. Railroad Co., 12 N. Y. 486; of Strong, J., in Hubbard v. Russell, 24 Barb. 404; and of Manning, J., in Caldwell v. Gale, 11 Mich. 77), still it must be regarded as the law of this commonwealth (McDonough v. Gilman, 3 Allen, 264, and cases cited). The cases are numerous in which this doctrine has been applied to private nuisances, but with the exception of Woram v. Noble, 41 Hun, 398, we have seen no case where the doctrine has been directly applied to the case of a public nuisance, although in Wenzlick v. McCotter, 87 N. Y. 122, 41 Am. Rep. 358, and Dodge v. Stacy, 39 Vt. 558, the court seems to have failed to notice any difference in this respect between private and public nuisances.

We think the rule should not be extended to a public nuisance like that in this case. The reason generally given for the rule is that, in the absence of any notice to the contrary, the grantee has the right to assume that the structures upon the land are rightfully there, and that, even where they may seem to interfere with the usual rights appurtenant to other estates, he may properly assume that the right thus to interfere has been lawfully obtained, and it is said that it would be inequitable to subject him to damages until he has had notice that in maintaining the structure or work complained of he is infringing upon the rights of others. The reason of the rule is not applicable to a case like this. The conductor, in its natural and intended use, caused ice to form upon the sidewalk, which, being dangerous to public travel, was a public nuisance. No matter how often the ice was formed, the right thus to incumber the street could not be lawful. The right to create such a nuisance was not a matter of grant, nor could it have been acquired by prescription. City of Holyoke v. Hadley Water-Power Co., 174 Mass. 424, 426, 54 N. E. 889; Inhabitant of New Salem v. Eagle Mill Co., 138 Mass. 8. In so far as the conductor, by its natural operation, caused the formation of such ice, it created a nuisance. The defendant, as owner, must have known this, or must be presumed to have known it. In such a case, the reason for the requirement of a notice does not exist, and we see no reason why the rule should be applied. See Matthews v. Railway Co., 26 Mo. App. 75. Exceptions overruled.

MUELLER

v.

CITY OF MILWAUKEE.

(*Supreme Court of Wisconsin, May 21, 1901.*)

[86 N. W. Rep. 162.]

Personal Injury—Ice on Street.*—Plaintiff slipped on an accumulation of ice in crossing a city street at a place 30 or 40 feet from the prepared crossing, though the street was lighted, and plaintiff could have seen where she was going. The weather had been cold, and the ice had been caused by a water trough, and extended some distance in the street. There was evidence that the ice was rough, but nothing to show that the roughness caused plaintiff's fall. *Held* not to show such a defect in the street as would authorize a recovery from the city.

Appeal from circuit court, Milwaukee county; Eugene S. Elliott, Judge.

Action by Martha Mueller against the city of Milwaukee for injuries resulting from a fall in the street of defendant city. From a judgment of nonsuit, the plaintiff appeals. Affirmed.

This is an action for personal injuries suffered by the plaintiff as the result of a fall upon the street in the city of Milwaukee. The plaintiff appeals from a judgment of nonsuit. The evidence shows that Brady street, in Milwaukee, is a street running directly east and west, with a cedar-block pavement, and that on the 11th of February, 1899, at about 9:30 o'clock p. m., the plaintiff was crossing Brady street from north to south, at a place 30 or 40 feet distant from the prepared street crossing, and that as she was stepping up from the roadway of the street to the sidewalk she slipped upon a large sheet of ice in the street, and fell, breaking her ankle. It appeared that the street was sufficiently lighted so that she could see where she was going; that the place of her fall was about 10 feet west of a certain watering trough at the end of the sidewalk; and that for two weeks prior to the accident the weather had been bitterly cold, and a considerable quantity of ice had formed near the trough, on the outer half of the sidewalk, and in the street extending for some distance west of the trough, and that it was on this ice that the plaintiff fell. There was some evidence tending to show that the ice was rough, but there was no evidence tending to show that the roughness caused the plaintiff's fall. The plaintiff testifies simply that she fell because she slipped, and that she slipped because of the ice.

*See Reedy *v.* St. Louis Brewing Ass'n, 5 Mun. Corp. Cas. 573.

McElroy & Eschweiler, for appellant.

Carl Runge, City Atty., and Joseph B. Doe, Asst. City Atty., for respondent.

Winslow, J. (after stating the facts). The nonsuit in this case was plainly right. Not only was the plaintiff walking upon the part of the street not prepared for foot passengers to walk upon, but the evidence utterly fails to show that she fell by reason of any actionable defect in the street. She testifies simply that she slipped upon the ice. This testimony does not show, or tend to show, that her fall was the result of any actionable defect. Chamberlain v. City of Oshkosh, 84 Wis. 289, 54 N. W. 618, 19 L. R. A. 513, 36 Am. St. Rep. 928. A verdict that she fell by reason of a defect in the street would be based merely upon conjecture. Hyer v. City of Janesville, 101 Wis. 371, 77 N. W. 729. These considerations render unnecessary any consideration of the effect upon the case of the passage of chapter 305 of the Laws of 1899, providing that no action based on the negligent accumulation of ice or snow upon a street shall be maintained unless the same shall have existed for three weeks. Judgment affirmed.

NAVARRE

v.

CITY OF BENTON HARBOR.

(*Supreme Court of Michigan, May 21, 1901.*)

[86 N. W. Rep. 138.]

Icy Sidewalks — Injuries — Surface Water — Flowage — Question for Jury.* Where a sidewalk along a much-traveled city street was so constructed that water flowing down a hill flowed across the walk, and the walk was so laid that the water and flowage from a garbage tank which was located near by flowed across the walk, and froze thereon, the question of the city's negligence in permitting such a condition so as to render it liable for an injury sustained by plaintiff from falling thereon was for the jury.

Error to circuit court, Berrien county; Orville W. Coolidge, Judge.

Action by Edith Navarre against the city of Benton Harbor.

*As to ice on streets, see Reedy *v.* St. Louis Brewing Ass'n, 5 Mun. Corp. Cas. 573.

As to when negligence of city in failing to keep streets in safe condition is a question for the jury, see Augusta *v.* Tharpe, 5 Mun. Corp. Cas. 560, and *note*, p. 567.

From a judgment in favor of defendant on a verdict directed by the court, plaintiff appeals. Reversed.

Gore & Harvey, for appellant.

H. S. Gray (G. M. Valentine, of counsel), for appellee.

Montgomery, C. J. This action was brought to recover damages for personal injuries sustained by plaintiff from a fall upon a sidewalk on High street, in the city of Benton Harbor, on January 23, 1899. High street is a principal street of the city, and much traveled. At the point where the injury occurred the street ascends a hill at a high grade. The sidewalk was four feet in width, and at the place of the injury was eighteen inches above the ground. From the inner side of the walk an embankment arose to a height of something like four feet. This embankment was faced with artificial stone. It appeared that abutting this embankment the walk had a slope towards the street of about four inches in four feet It also appeared that there was a drop in the walk at that particular point,—a place where the walk had settled down,—making it slope off towards the gutter, and, as may be inferred, arresting the flow of water lengthwise of the walk. There was testimony tending to show that the result of this was to accumulate ice at the place of this drop, and that it would form there, and had been accustomed to form there for a considerable period before the injury. It was also in evidence that adjacent to this point on the walk was a building, occupied by tenants, and that a large garbage tank was located upon these premises near the embankment, and that the liquid from this garbage tank found its way into this walk through a leakage, and that this had continued from 1896 down to the time of the injury to the plaintiff, in 1899; that the flowage from the garbage tank followed the depression in the sidewalk; that the result was that this depression and drop in the walk formed a course for the flowage of the liquids from the garbage tank and other waters that flowed from the adjoining premises, and in cold weather it became frozen, and formed a sheet of ice from two to three feet in width and from a half inch to an inch and a half in thickness. The walk was not safeguarded by rails, nor were there any cleats of any kind. There was sufficient evidence to justify the submission to the jury of the question of whether the city had notice of these defects. The injury to the plaintiff occurred in the early morning, before daylight, while going from her rooms to her work; and, while some question is made in the briefs of counsel as to whether the injury is shown to have occurred at the point in question, we think this was a question for the jury. The circuit judge was of the opinion that the case should be ruled by Gavell v. City of Jackson, 109 Mich. 408, 67 N. W. 517, 32 L. R. A. 861, and directed a verdict for the defendant. We think the case should have been left to the jury. There

was here a concurrence of a peculiar formation of the walk, which arrested the flow of water down the hill, and caused it to flow across the walk at this point, forming an open gutter, with the improper flow of wastage from the garbage tank, resulting in a dangerous and icy place. The case is distinguished from Gavett v. City of Jackson in these respects: In that case a majority of the court was of the opinion that there was no improper flowage of water across the sidewalk in question, which was itself in good repair, and not so laid as to cause water to accumulate and form ice. That cannot be said of the present case. The jury would be justified in infering that the depressed condition of this walk was such as to induce the formation of ice in unusual quantities, and it certainly would be justified in finding that an improper flowage of the wastage from the garbage tank was permitted by the city, and continued for a long period. Canfield v. Railway Co., 78 Mich. 356, 44 N. W. 385. The case is a close one on its facts, but closely resembles Hughes v. City of Lawrence, 160 Mass. 474, 36 N. E. 485, and is in principle like Fitzgerald v. Inhabitants of Woburn, 109 Mass. 204. See, also, Hampson v. Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732; Wood, Nuis. § 120. The judgment will be reversed, and a new trial ordered.

Moore and Long, JJ., concurred. Hooker and Grant, JJ., concurred in the result.

ROGERS PARK WATER COMPANY, Plff. in Err.,

v.

JOHN B. FERGUS.

(*Argued and Submitted October 31, 1900. Decided March 25, 1901.*)

[21 Sup. Ct. Rep. 490.]

Contracts Concerning Governmental Functions—Strict Construction.—A contract concerning governmental functions, such as one which affects the right of a city to regulate rates of a water company, must be strictly construed; and such functions cannot be held to have been stipulated away by doubtful or ambiguous provisions.

Franchise of Water Company—Municipal Regulator of Water Rates.*—An ordinance granting an exclusive franchise to a water company, with the right to use streets, requiring the municipality to pay certain rentals, and binding the grantee, among other things, to furnish an adequate supply of water, does not give a contract right to charge the rates named in the ordinance for the whole period of the franchise by virtue of a provision that the grantee "shall charge the following annual rate to consumers of water during the existence of this franchise," as

*See Freeport Water Company *v.* City of Freeport, *ante*, p. 613.

this is merely a regulation of the right to charge rates, and does not amount to a stipulation that no other regulation will be made during the term of the franchise.

In Error to the Supreme Court of the state of Illinois to review a decision affirming a judgment sustaining a demurrer to an answer to a petition for mandamus to compel a water company to furnish water at rates fixed by ordinance. Affirmed.

See same case below, 178 Ill. 571, 53 N. E. 363.

Statement by Mr. Justice McKenna:

This is a petition for a writ of mandamus which was brought by the defendant in error on the 13th of December, 1897, in the circuit court of Cook county, state of Illinois, against the plaintiff in error, to compel it to furnish him water at rates fixed by an ordinance enacted by the city of Chicago.

Case Stated.

The defense is that such ordinance impairs the obligation of the contract which plaintiff in error claims to have with the village of Rogers Park before its annexation to the city of Chicago, as hereinafter mentioned.

The village of Rogers Park was from November 12, 1888, and until April 4, 1893, a municipal corporation organized under the laws of Illinois. At the latter date it was annexed to the city of Chicago.

The Rogers Park Water Company, plaintiff in error, was a corporation, incorporated about the 24th of January, 1889, under the laws of Illinois, to construct and operate a system of waterworks in the village of Rogers Park, and to acquire such property and exercise the powers necessary thereto.

The company constructed and operated a system of waterworks in said village, and the premises of the defendant in error were connected thereto and supplied with water therefrom. The rates for such water under the ordinance of the city of Chicago were $8.72, payable in advance, for the current half-year from November 1, 1897, to May 1, 1898. Those rates were tendered to the company, and a supply of water demanded of it. The company refused to comply, demanding $13.50 for such supply, claiming that sum under § 12 of an ordinance of the village of Rogers Park before its annexation to Chicago, and which ordinance empowered the construction of the waterworks system.

The contract which plaintiff in error claims is based on that ordinance. It was passed November 12, 1888, and was entitled "An Ordinance to Provide for a Supply of Water to the Village of Rogers Park, Illinois, and Its Inhabitants, Contracting with H. E. Keeler, his Successors and Assigns, for a Supply of Water for Public Use, and Giving the Said Village of Rogers Park, Illinois, an Option to Purchase the Said Works."

It was provided that, in consideration of the public benefit to be derived therefrom, the village of Rogers Park, Illinois,

granted the exclusive right and privilege, for a period of thirty years from the time the ordinance should take effect, "unto H. E. Keeler, his successor and assigns, of erecting, maintaining, and operating a system of waterworks in accordance with the terms and provisions" of the ordinance. There was a grant of the use of the streets and alleys for mains and conduits, and power given to extend the system to new territory, if any should be acquired by the village. There were provisions prescribing the character of the system to be constructed, and that the village should pay "an annual rental for fire protection, for less than 5 miles of mains within the corporate limits of said village, for the aforesaid period of thirty years, at the rental rate of five hundred and seventy-five (575) dollars for each mile of main, to be payable semiannually." There were also provisions for payment of taxes by the company, the flushing of sewers, and the maintenance of fountains, for the supply of water to the inhabitants, the quality of water, and the manner of the supply before prescribed, and for the acceptance in writing by the company of the terms of the ordinance. Provision was also made for the purchase of the system by the village.

Section 12 was as follows:

"The said grantee or assigns shall charge the following annual water rates to consumers of water during the existence of this franchise, and they shall have the right at any time to insert a water meter into the service pipe of any consumer, and to charge and collect from him at meter rates, provided that in such case the minimum annual rate paid by any one consumer shall be $5."

Then follow the rates for the particular purpose for which the water might be used.

Section 13 provided for the levy of a tax to meet the payments stipulated by the ordinance, which should be irrepealable.

Section 14 was as follows:

"Within sixty days after the passage of this ordinance said H. E. Keeler, his successors and assigns, shall file with the village an acceptance of the same, which acceptance, duly acknowledged before some officer duly authorized to administer oaths, shall have the effect of a contract between the village and said H. E. Keeler, his successors or assigns."

The plaintiff in error is the assignee of Keeler.

The plaintiff in error claimed in its answer that said ordinance of the village of Rogers Park constituted a contract with plaintiff in error by which it had the right to charge the rates contained in § 12, and that the ordinance of the city of Chicago reducing their rates impaired such contract, and violated not only the Constitution of the state of Illinois, but also violated § 10, article 1, of the Constitution of the United States, as well as the 14th Amendment.

One of the defenses of the plaintiff in error was that the

premises of defendant in error were connected with the system by reason of his written application, which application was accepted and became a contract. The defense, however, is not made in this court, and further reference to it is omitted.

There was a demurrer filed to the answer of the plaintiff in error, which set up its defenses under the Constitution of the United States. The demurrer was sustained. Certain issues of fact were made on other pleadings, upon which there was a trial by jury, resulting in a verdict for petitioner and judgment on the verdict. The judgment was affirmed by the supreme court of the state (178 Ill. 571, 53 N. E. 363), and this writ of error was sued out. The assignments of error present constitutional questions only.

Mr. Newton A. Partridge for plaintiff in error.

Mr. Jesse B. Barton submitted the case for the defendant in error.

Mr. Justice McKenna, after making the above statement, delivered the opinion of the court:

At the time of the passage of the ordinance of November, 1888, by the village of Rogers Park, counsel for plaintiff in error says "two general acts were in force in Illinois, which related to the power of municipalities to pass ordinances for waterworks to be built and operated by private enterprise." The first is as follows:

"An Act Entitled 'An Act to Enable Cities, Incorporated Towns and Villages to Contract for a Supply of Water for Public Use, and to Levy and Collect a Tax to Pay for the Water so Supplied.' (Approved April 9, 1872. In Force July 1, 1872. L. 1871-2, p. 271. This title is as Amended by Act Approved June 26, 1885, in Force July 1, 1885, p. 64.)

"Sec. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That in all cities, incorporated towns and villages where waterworks have been or may hereafter be constructed by any person or incorporated company, the city, town, or village authorities in such cities, incorporated towns and villages may contract with such person or incorporated company for a supply of water for public use for a period not exceeding thirty years." (As amended by act approved June 30, 1885. In force July 1, 1885, L. 1885, p. 64.)

"Sec. 2. Any such city or village so contracting may levy and collect a tax on all taxable property within such city or village for the water so supplied."

The second, passed one day later and taking effect on the same day as the first, was the cities, villages, and towns act. The title to that act and the article and section bearing upon this case are as follows:

"An Act Entitled 'An Act to Provide for the Incorporation of Cities and Villages.' (Approved April 10, 1872. In force July 1, 1872. Laws of 1871-2, p. 218.)

"Article X. section 1. The city council or board of trustees shall have the power to provide for a supply of water by the boring and sinking of artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs, or waterworks, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years; also to prevent the unnecessary waste of water; to prevent the pollution of the water, and injuries to such wells, pumps, cisterns, reservoirs, or waterworks."

These acts are urged to establish the power in the village of Rogers Park to grant to the plaintiff in error the right to charge and collect for thirty years the rates prescribed by the ordinance of November, 1888. We have passed on a similar contention in Freeport Water Co. v. Freeport, 180 U. S. —, post, 493, 21 Sup. Ct. Rep. 493, and in Danville Water Co. v. Danville, 180 U. S. —, post, 505, 21 Sup. Ct. Rep. 505; and we need not repeat the reasoning. Besides, it is disputable if the ordinance of 1888 justifies the claim of plaintiff in error. The supreme court of the state held that it did not. A strict construction must be exercised. The contract claimed concerned governmental functions, and such functions cannot be held to have been stipulated away by doubtful or ambiguous provisions.

Contracts Concerning Governmental Functions —Strict Construction.

Section 1 of the ordinance recites "that, in consideration of the public benefit to be derived therefrom, the village of Rogers Park, Illinois, hereby grants the exclusive right and privilege, for a period of thirty years . . . unto H. E. Keeler, his successor or assigns," of erecting and maintaining a system of waterworks. The use of the streets was also granted for such purpose.

Section 3 recites, "in consideration of the public benefits and the protection of property resulting from the construction of said system of waterworks," the village agrees to pay a certain annual rental proportional to the length of the mains.

The grantee, on his part to pay "all municipal and village taxes" (§ 3), "in consideration of the rentals herein agreed to be paid and in consideration of the rights and privileges granted" (§ 4), agreed to furnish the village and the residents thereof an adequate supply of water. Failing to supply water for a year in quantity or quality stipulated, the "franchise and all their rights and privileges granted under this ordinance, and the contract entered into, shall be null and void."

If the ordinance contained any other provisions it could not be claimed that the company's charges to consumers of the water furnished them were free from regulation by the municipality if it otherwise had power of regulation. There are other provisions, and especial stress is laid upon them. Section 12 provides as follows:

"The said grantee or assigns shall charge the following annual water rates to consumers of water during the existence of this franchise, and they shall have the right at any time to insert a water meter into the service pipe of any consumer, and to charge and collect from him at meter rates, provided that in such case the minimum annual rate paid by any one consumer shall be $5."

Then follows an enumeration of uses and the rates for such uses. There is a schedule for meter rates, and also the following provision:

"Rates for all other purposes that may be applied for, not named in the foregoing schedule of maximum rates, will be fixed by estimation or meter, at the option of the grantee or assigns."

This, it will be observed, is the language of command, not of contract; of limitation on power, not a bargain giving power. The right to charge the inhabitants of the village for the water supplied to them resulted from the right to construct and maintain the system. Section 12 was a regulation of the right. There is no stipulation that it will be the only instance of regulation; that the power to do so is bartered away; and that the conditions which determined and justified it in 1888 would remain standing, and continue to justify it through the changes of thirty years. It would require clearer language to authorize us in so holding. The predecessor of the plaintiff in error was given the monopoly of the supply of water. That might be necessary to induce the investment of capital, and for its security the obligation of a contract might be sought and given. There was no such inducement for an unalterable rate. A reasonable rate the law assured, and assured even against governmental regulation. And the statute of 1891, which is especially complained of, assures it. By § 1 of that statute municipalities are "empowered to prescribe by ordinance maximum rates and charges," and if unreasonable rates and charges be fixed they may be reviewed and determined by the circuit court of the county in which the municipality may be. There is no complaint in this case that the rates fixed by the ordinance of 1897, passed by the city council of Chicago, were unreasonable. Plaintiff in error relies strictly on a contractual right. We think it has no such right, and the judgment of the Supreme Court is affirmed.

Franchise of Water Company —Municipal Regulation of Water Rates.

Mr. Justice White, with whom concurs Mr. Justice Brewer, Mr. Justice Brown and Mr. Justice Peckham, dissenting:

This case, in my opinion, should be controlled by the same principles which, it seemed to me, should have been applied in the case of the Freeport Water Co. v. Freeport, just decided, 180 U. S. —, post, p. 493, 21 Sup. Ct. Rep. 493. The only difference of fact between that and the present one is this: In the Freeport Case the matter involved was the power of the city to contract and to fix the rates to be paid for a

supply of water for public use during the designated period. Here the question is whether the city of Rogers Park had power to contract for the construction and maintenance of waterworks, and in such contract to fix the rates to be charged for the water to be supplied to private consumers during the contract period.

The authority under which the contract in question was made was the two acts of the legislature of the state of Illinois considered in the Freeport Case, that is to say, the acts of April 9, 1872, and April 10, 1872. There is this difference, however: The act of April 9, 1872, was amended on June 26, 1885 (Public Laws of Illinois, 1885, p. 64), so as to authorize contracts for a supply of water as therein stated to be made with private individuals as well as private corporations. Thus authority existed to contract with individuals under both acts. The ordinance passed by the city of Rogers Park and the contract made, as fully recited in the opinion of the court, was for the erection, maintenance, and operation of waterworks, the extension of the system as might be required, the payment of an annual rental by the city for public hydrants, and the establishment of the rates to be paid by private consumers during the contract period.

The language of the legislative act conferring authority to fix the rates, it seems to me, clearly sanctions the establishment by contract of the rates for private use, as it did those to be paid for the public supply. The fixing of rates is plainly generic, and of necessity embraced those rates which were to be paid for the supply of water which the statute authorized the city to contract for. So far as the power of the legislature to authorize a contract for designated rates for a stipulated time is concerned, I can see no difference between fixing the rates for the public and those for the private supply during the authorized time. This in my judgment is conclusively settled by the authorities to which reference was made in my dissent in the Freeport Case. Especially is this shown by the ruling of the court in Los Angeles v. Los Angeles City Water Co. 177 U. S. 569, 44 L. Ed. 892, 20 Sup. Ct. Rep. 736, where it was, in effect, decided that a contract, made by a municipality with a water company, that existing rates to private consumers should not be reduced during the life of the contract, was a valid stipulation, provided that the action of the city was previously sanctioned or was subsequently ratified by legislative authority.

The only question, then, remaining to be examined, seems to me to be whether the particular contract made by the city of Rogers Park, considered in this case, fixed the rates for private consumers for the period of the contract. And this only involves an examination of the contract for the purpose of determining its import. Of course, it is conceded, under the rule of construction stated by me in my dissent in the Freeport Case, that if doubt arises from an analysis of the

provisions of the contract, that doubt must be solved against the water company and in favor of the municipality. But it is submitted that there can be no doubt, from a consideration of the text of the contract, that it fixed the rates to be paid by private consumers during the life of the contract. The ordinance established in detail a tariff of specific water rates for private purposes, embracing an enumeration which would seem to include every variety of use. It conferred upon the contractor the right, if he did not choose to charge these rates, to insert in the connection a water meter, and to charge for the water supplied at meter rates, instead of at the aggregate sum otherwise fixed. The opening clause of § 12 read as follows: "The said grantee or assigns shall charge the following annual water rates to consumers of water during the existence of this franchise, and they shall have the right at any time to insert a water meter into the service pipe of any consumer, and to charge and to collect from them at meter rates, provided that in such case the minimum annual rate paid by any one consumer shall be $5." As I understand this language, it without doubt embodies the rates, whether fixed by the purpose for which the water was taken or by the meter measurement, and explicitly stipulates that these rates may be charged during the life of the contract. Indeed, it seems to me impossible to conceive that the contract for the construction, maintenance, and supply would have been entered into without such agreement. Can it in reason be said, in view of the terms of the contract, that if the water company had wished to charge more than the contract price, on the ground that an unreasonably low sum had been fixed in the contract, that it would have had a right at once to ignore the contract stipulation and exact higher rates? If it cannot be, how can it be held that the city had the right at its pleasure to disregard the rates fixed in the contract? Was not the obligation of one the correlative of the right of the other? To say that the provisions of the contract constitute the language of command, and not the language of contract, does not weaken or obliterate the unambiguous provisions of the agreement into which the parties entered. They were indeed, in my judgment, commands, arising from the express authority conferred upon the municipality by the legislature of the state of Illinois, sanctioned by the agreement of the parties, and protected from impairment by the Constitution of the United States.

RICE *et al.*

v.

NATIONAL CITY *et al.* (L. A. 737.)

(*Supreme Court of California, March 29, 1901.*)

[64 Pac. Rep. 580.]

City Marshal—Salary—Increase—Term of Office.—The board of trustees, on March 16, 1898, fixed the salary of the city marshal at $5 per month, and $1 for each dog impounded. Defendant was elected city marshal on April 11, 1898, but refused to qualify and file a bond. On June 21, 1898, the board of trustees increased the salary of the city marshal to $25 per month, and on July 13th appointed defendant marshal, and he qualified and entered on the duties of his office. *Held*, that the contention that defendant was not entitled to receive $25 per month, because the increase in salary was made in violation of a statute forbidding an officer's salary to be raised during his term of office, cannot be sustained, since his term did not begin until he qualified and accepted the office.

Commissioners' decisions. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by J. A. Rice and another against National City and Samuel W. Smith, to enjoin the payment of a certain sum to defendant Smith as city marshal. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

D. M. Hammack, for appellants.

L. E. Dodmun, for respondents.

Haynes, C. The plaintiffs, taxpayers of national City, brought this action against said city, and Samuel W. Smith, as city marshal, and also against the city clerk and treasurer, to enjoin them from paying said city marshal the sum of $25 per month, that being the salary fixed by a certain ordinance, which plaintiffs contend increased the salary of the marshal after his term of office commenced. The defendants demurred to the complaint for want of facts, and, their demurrer having been overruled, declined to answer, and now appeal from the judgment thereupon entered.

Defendant Smith was elected to the office of city marshal at the April election, 1896, for the term of two years, and qualified and entered upon the duties of his office on the 20th of that month, the monthly salary of the city marshal being then fixed by ordinance at $40 per month. On March 16, 1898, shortly before the expiration of his term of office, the board of trustees passed a new ordinance, in which it was

provided that the city marshal should receive $60 per year, payable in monthly installments of $5 each, and also $1 for each dog impounded under the authority of the ordinances of said city, and in case the dog was redeemed under the provisions of the ordinance, as well as under certain other circumstances mentioned in the ordinance, he should receive $1.50 per dog. At the regular election held April 11, 1898, defendant Smith was again elected city marshal for the term of two years, commencing on April 20, 1898, and was duly declared elected, and notified by the city clerk of his election. It is further alleged that defendant Smith failed, refused, and neglected to file his bond and take the oath of office and to qualify under his said election, and "that a vacancy in said office was thereby created, and said office thereupon became vacant, but the said defendant held over until his successor was elected and qualified, and that said defendant did so voluntarily hold over and act as city marshal and to fill said vacancy created by his refusal to qualify." It is further alleged that on June 21, 1898, the board of trustees adopted a new ordinance (No. 140), "attempting to amend said ordinance No. 138, by which [new ordinance] the salary and compensation of the marshal of said city was raised and increased from the sum of five dollars per month to twenty-five dollars per month." It is further alleged that on July 13, 1898, "the board of trustees of said city filled the vacancy so created by electing and appointing said defendant to said office, and that afterwards, and in the manner and within the time required by law, said defendant qualified under said election and appointment of said board of trustees, and that said defendant is now filling said office according to law." It is also alleged that ever since said appointment the marshal has been paid said salary, and that the clerk will continue to draw warrants therefor, and the city treasurer to pay them, unless enjoined from so doing.

It is clear from the allegations of the complaint that defendant Smith did not take office under his election in April. He refused to qualify, and, as alleged, a vacancy resulted. The term of the office, as fixed by the municipal government act, is two years, dating from the 20th of April after the election. But that does not necessarily fix the term of the officer. The language of the statute is, "their several terms of office," not during the statutory term fixed for the office. Incumbents frequently die. Sometimes they resign. In either case the term of the incumbent ends. If the people fail to elect an officer, or if the person elected fails or refuses to qualify, the incumbent holds over until his successor is appointed or elected and qualifies; but the period during which he holds over is not a new term, but is a continuance or prolongation of the term for which he was elected. It was so held in People v. Edwards, 93 Cal. 153, 157, 28 Pac. 831, where it was also said: "During the time he holds over his salary cannot be

increased, and he and his sureties are liable on his official bond for all his acts until his successor is elected or appointed and qualified." Or, as said in People v. Ward, 107 Cal. 239, 40 Pac. 538: "He had a fixed tenure and a contingent term." See, also, People v. Hammond, 66 Cal. 654, 6 Pac. 741, and Dillon v. Bicknell, 116 Cal. 111, 47 Pac. 937. If Doe had been appointed instead of Smith, it would hardly be contended that the ordinance passed in June, prior to his appointment, increased or in any manner changed his compensation "during his term of office," which could not begin until he was appointed and qualified. If the statute had provided that the compensation attached to the office of city marshal should not be increased or diminished during the statutory term of two years for which the marshal shall be elected, respondent's contention would be sound. The difference, however, is apparent. The object of the statute is to protect the incumbent against a reduction of compensation during his occupancy of the office, and also to take away all inducement to use his official influence and efforts to procure an increase of it during his incumbency; and in accepting the appointment Smith had a right to rely upon the compensation as then fixed, but which could not take effect until he entered upon a new term under his appointment. Our conclusion upon the main question renders it unnecessary to consider the question whether the complaint is otherwise sufficient. The judgment should be reversed, with directions to dismiss the action.

We concur: Gray, C.; Cooper, C.

Per Curiam. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to dismiss the action.

CAHEN

v.

WELLS, Auditor. (S. F. 2,439.)

(*Supreme Court of California, April 6, 1901.*)

[64 Pac. Rep. 699.]

Municipal Corporations—Civil Service—Statute Providing Same Constitutional.—The San Francisco city and county charter (St. 1897, p. 350, art. 13) establishes a civil service commission, and requires that all places of employment in the different offices and departments shall be filled by appointments from the applicants receiving the highest rank in competitive examinations therefor conducted by the commissioners. Regulations as to the conduct of the examinations are prescribed and section 12 provides that no deputy, clerk, or employee who shall have been appointed under the rules shall be removed or discharged except for cause, on written charges, which shall be investigated by the com-

missioners. *Held*, in a proceeding to enjoin the payment of the salaries and expenses of the commissioners, that though section 12 might be unconstitutional, as violating Const. art. 20, § 16, prohibiting the holding of an office, the tenure of which was not fixed by law, for more than four years, inasmuch as the general provisions of the law were not inseparably dependent on section 12 the entire act was not void.

In bank. Appeal from superior court, city and county of San Francisco; Carroll Cook, Judge.

Proceeding by S. Cahen against Asa R. Wells, auditor of San Francisco city and county, to enjoin the payment of salaries and expenses of the civil service commissioners. From an order sustaining a demurrer to the complaint, the plaintiff appeals. Affirmed.

P. F. Dunne, for appellant.

Lloyd & Wood, Franklin K. Lane, George W. Lane, and Garret W. McEnerney, for respondent.

McFarland, J. This case differs materially from the case of Crowley v. Freud (this day decided) 64 Pac. 696, although the two cases were argued and submitted at the same time, and both involve powers of the civil service commission created by the present charter of the city and county of San Francisco. This action was brought to enjoin the defendant, Wells, who is auditor of said city and county, from drawing any warrant in payment of salary of the civil service commissioners, or of any employee of said commissioners, or of any expenses of said commission, on the ground that all the provisions of said charter on the subject of civil service are unconstitutional and void. A general demurrer to the complaint was sustained in the court below, and judgment rendered for defendant, and from that judgment plaintiff appeals.

The provisions of the charter (St. 1897, p. 350) here brought in question are contained, under the caption of "Civil Service," in article 13 of that instrument. This article is quite lengthy, and contains 20 sections (St. 1897, p. 350). The main attack in this case is made on section 12. Leaving that section out of view for the present, it will be sufficient for the purpose of this decision to state very briefly some of the provisions of the other sections of the article. Those provisions are, in substance, as follows: Three persons, who shall constitute the "civil service commission," shall be appointed by the mayor, and shall "classify all the places of employment under the offices and departments of the city and county"; and it is provided in section 2 that "no appointment to any such place shall be made except according to the rules hereinafter mentioned." Id. p. 350. The commissioners are to make rules "for examinations, appointments, promotions, and removals"; and "all applicants for places in the classified civil service shall be subject to examination, which shall be public, competitive and free." The ex-

aminations are to be held after notice, and are to be conducted either by the commissioners or by examiners appointed for that purpose. From the returns of the examiners a register is to be prepared of persons whose general average standing upon the examination is not less than the minimum fixed by the rules, and who are otherwise eligible; and such persons "shall take rank upon the register as candidates in the order of their relative excellences as determined by the examination." When a position is to be filled in any department or office, the head of the same shall notify the commissioners of that fact, and the commissioners shall thereupon certify to the appointing officer the name of one or more candidates, not exceeding three, standing highest on the register of the class to which the position belongs; and the appointing officer shall fill the place by the appointment of the person certified by the commissioners, if only one be certified, or, if two or three be certified, then by the appointment of one of those certified. The first appointment is declared to be on "probation" for a period "to be fixed by the rules of the commissioners," but not to exceed six months; and during this period of probation the head of the office may, "by and with the consent of the commissioners," discharge the person appointed "upon assigning in writing his reasons therefor to the commissioners." If he is not discharged within the probation period "his appointment is deemed complete." It is also provided that to meet "extraordinary exigencies" the head of an office may, "with the approval of the commissioners," make temporary appointments to remain in force until regular appointment under the provisions of the article may be made, but not exceeding 60 days. There are other details as to appointments under the said article 13, which need not be here mentioned.

Said section 12 is as follows: "Sec. 12. No deputy, clerk, or employee in the classified civil service of the city and county, who shall have been appointed under said rules, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before the civil service commission, or by or before some officer or board appointed by the commissioners to conduct such investigation. The finding and decision of the commissioners, or such investigating officer, or board, when approved by the commissioners, shall be certified to the appointing officer or board and shall be forthwith enforced by such officer. Nothing in this article shall limit the power of any officer or board to suspend a subordinate for a reasonable period not exceeding thirty days." Id. p. 352. Appellant contends that section 12 is unconstitutional and invalid, because it provides for a life tenure of office, and is therefore in violation of section 16 of article 20 of the state constitution, which is as follows: "When the term of any officer or commissioner is not provided for in this constitution, the term of such officer or commissioner

may be declared by law; and if not so declared such officer or commissioner shall hold his position as such officer or commissioner during the pleasure of the authority making the appointment; but in no case shall such term exceed four years." * Of course, a judgment in favor of appellant in this present action would obliterate all the provisions of the charter on the subject of civil service, and therefore plaintiff must maintain the unconstitutionality not only of the provisions of section 12, but also of all the other provisions of article 13. This he endeavors to do by showing that the life tenure which he claims to be created by section 12 is the main, controlling, final, and vital purpose of all the provisions of the charter about civil service, and that if section 12 be unconstitutional the other provision, being merely introductory, ancillary, and instrumental to the main purposes, must fall with it. His positions, therefore, are: First, that section 12 is unconstitutional; and, second, that its unconstitutionality carries with it the unconstitutionality of the whole scheme of civil service presented in the charter, all the provisions being so inseparably blended that no part can stand if other parts are invalid.

In our view of appellant's second position, it is not necessary for us to determine whether or not his first position is tenable. We have not before us the case of a person who, having been appointed under the civil service provisions of the charter, and having held his position for more than four years, claims to be entitled to hold it for life. Whether or not section 12 undertakes to provide for terms of office in excess of the limitation of section 16 of article 20 of the constitution; whether or not all persons dealt with by article 13 of the charter are within the description "officer," as used in said section 16; whether or not the head of an office might remove a subordinate without the consent of the commission,—these and other questions which would be involved in passing on the constitutionality of section 12 can be more properly determined as the facts of future cases may present them. In the present action they are remote, general, and speculative.

In the briefs of counsel on both sides there are a great many quotations from sayings of people who are designated as prominent "civil service reformers"; and it is insisted by respondent that, in the opinion of these reformers, the main principle of what is called "civil service reform" is that appointments to subordinate official positions shall be made only after competitive examinations, and upon the basis of merit, to be ascertained by such examinations, while it is insisted by appellant that "according to those opinions" a permanent tenure for life, subject only to removal for cause after a trial, is the mainspring of such reform, without which all the other machinery would be useless. While the decision in this case as to the purposes of the framers of the charter must rest on the language to be found in the charter itself, yet

it may be said that its language seems to be in accord generally with the views of said reformers quoted in the briefs. The purpose to be gathered from the language of the charter, as well as from said quotations in the brief, is clearly dual. One of the purposes is to secure a change in the method of appointment of subordinates, and most of the provisions of article 13 are especially directed to that end. It is clear that one of the supposed evils which civil service was expected to eradicate was the tendency to give places as rewards of political services, which left open the temptations to make improper promises and bargains about appointments prior to elections and party conventions. The intended remedy is what is called the "merit system," by which it is sought to give places to such persons best fitted to discharge the duties of such places, upon the theory that fitness can be best ascertained by a competitive examination. Under this system the head of an office has no opportunity to appoint a friend, and it is assumed that he would not be likely to select as competent a man as an examining board would select for him. It is apparent that this is one of the main purposes appearing on the face of article 13 of the charter. The great body of the article deals with the appointments of subordinates, and with the details of the examinations of candidates for such appointments. And this is an independent purpose not inseparably interwoven with section 12, and, not being itself unconstitutional, is not involved in the asserted unconstitutionality of section 12, and can stand as a valid enactment, even though section 12 be eliminated. Appellant contends—and quotes some of the "sayings" above noticed—that all the provisions about appointments under the so-called "merit system" would be worthless without the provision in section 12 against removals, and that therefore the two are inseparably connected. But since the head of an office could not, under the merit system, fill a vacancy with a person of his own choice, but must do so with the person, or one of the two or three persons, certified by the commission, the incentive to make removals, except for actual incompetency, would be very slight. One of the reformers quoted in the brief, after pointing out that removals are rarely asked for except to make a vacancy for a particular man, says, "Under the merit system of appointment, the question of removals would be solved without legislation."

Our conclusions are that those sections of article 13 of the charter which provide for the method of appointment are not inseparably interwoven with section 12, which deals with removals; that those sections stand as valid enactments, even though section 12 be eliminated; and that there applies to the case at bar the well-established rule of construction which is stated in Cooley, Const. Lim. p. 211, as follows: "If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed

in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. * * * If a statute attempts to accomplish two or more objects, and is void as to one, it will still be in every respect complete and valid as to the other." We must not be understood, however, as in any way expressing an opinion as to the constitutionality of said section 12. The judgment appealed from is affirmed.

We concur: Beatty, C. J.; Henshaw, J.; Garoutte, J.; Van Dyke, J.; Temple, J.; Harrison, J.

MAYOR, ETC., OF CITY OF MACON

v.

WING.

(*Supreme Court of Georgia, March 27, 1901.*)

[38 S. E. Rep. 392.]

Evidence—Damages.—Although the evidence as to the damage sustained by the plaintiff was conflicting, that of each of a number of witnesses in the case was sufficient to authorize the verdict.

Right of Access—Change of Grade—Damages.*—The right of access from a street by the owner of land abutting on such street is a property right, of which he cannot be deprived without compensation; and when a municipal corporation, in the exercise of the power conferred on it to grade and improve its streets, destroys or impairs such right, the corporation is liable to the owner in an action for damages.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

Action by G. F. Wing against the mayor and council of the city of Macon. Judgment for plaintiff, and defendant brings error. Affirmed.

Minter Wimberly, for plaintiff in error.

S. A. Crump and Guerry & Hall, for defendant in error.

Case Stated.

Little, J. Wing instituted an action against the mayor and council of the city of Macon to recover damages for injuries sustained by the change of grade and narrowing of a street, and by moving the sidewalk away from his property. The evidence established the following facts: Wing owned a lot, on which was situated a brick storehouse, in the city of Macon. The original street on which his land abutted was very wide and uneven. In 1897 the municipal

*See notes at end of case.

authorities narrowed the street, and put down a new sidewalk, curbing, etc., leaving a space of about 25 feet from the new sidewalk to the door of Wing's building, in front of which the sidewalk originally ran. At different places up and down the street other landowners had brought out their buildings over the intervening space between their respective lots and the new line, so as to be immediately adjacent to the new sidewalk. There was a conflict in the evidence as to whether the grade of the original street had been lowered, and also as to whether the pecuniary value of the land and building of Wing had been diminished because of these changes in the street. Very much evidence was introduced pro and con on these and other questions material to the issue. The jury returned a verdict for the plaintiff for $218. The defendant made a motion for a new trial, which was overruled, and it excepted.

1. The motion contains a number of grounds alleging error on the part of the trial judge in the admission of evidence and in charging the jury. These we have carefully considered, and, as explained by notes made to several of them, we are of the opinion that the judge did not err, either in the admission of evidence or in giving the instructions to the jury of which complaint is made. It is also insisted that the verdict is contrary to the evidence and without evidence to support it. With this contention we cannot agree. The evidence as to the damage which the plaintiff claimed he sustained, and whether his land had been benefited or injured by the change in the street, was conflicting. Notwithstanding this, however, a number of witnesses who were sworn in the case by the plaintiff testified that the property was damaged, and to the amount of such damage, in almost every case exceeding that named by the jury. A case similar to this in all respects was heard and determined by this court on the refusal of the judge to grant a new trial to the city of Macon (Mayor, etc., v. Ryle, 108 Ga. 810, 33 S. E. 1013), and this court ruled in that case that the evidence, though conflicting, authorized the judgment which was rendered. So we rule again.

Evidence—Damages.

2. It is also claimed that the verdict was contrary to law. We think not. The right of access from a street to his land is a property right of the owner of land abutting on such street. It has been called the "easement of access," and it is so far regarded as private property that not even the legislature can take it away and deprive the owner of it without compensation. Elliott, Roads & S. (2d Ed.) § 695, and authorities cited in note 4, p. 749. In the case of Austin v. Railway Co., 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755, this court ruled that property was damaged, in the sense of the constitution, when there was some physical interference with a right or use appertaining to the property. See, also, 24 Cent. Law J. p. 51. That the municipal corporation is liable for such injuries, see City of Atlanta v.

Right of Access—Change of Grade—Damages.

Notes

Green, 67 Ga. 386, and Pause v. City of Atlanta, 98 Ga. 92, 26 S. E. 489. The evidence was practically undisputed that access to the building owned by Wing was rendered more difficult by the narrowing of the street and change of the sidewalk by the municipal corporation. It is true that the principal item of damage shown by the evidence resulted from the location of other buildings on land which was formerly a part of the street, so as to conform to the new line. Unless authority was given for the erection of such buildings by the municipal authorities, it would not at all follow that they would be responsible for the damages caused by such erection. It would, however, as we think, follow that, if such erections were caused by the action of the municipal authorities, not only might the owners of the new buildings be liable if their building was unauthorized, but the municipal corporation would be, if they caused the occupancy of the street which damaged plaintiff. There was sufficient evidence in this regard to show that the erection of the new buildings on the space left between the old and the new sidewalk, and the bringing out of the old buildings to the new line of the street, was done by authority and permission of the mayor and council of the city of Macon. Indeed, the jury could readily have determined from the evidence of the officers of the city that it was the intention of the city authorities that this should be done when the street was narrowed. The plaintiff testified that he saw a deed made by the city authorities to one of these abutting landowners, whose building was subsequently brought out, conveying the encroachment between the old and the new sidewalk. Not only so, but the commissioner of public works of the city of Macon testified that, if the property of the plaintiff was his, he would avail himself of the opportunity that the city gave to them, knowing where the curb line would be for months before it was put down, and that "it was expected all of them would do so. Some did, but some did not. I think it would repay them to do so. Their conditions would be much better off." The jury having determined the contested questions of fact, and there being evidence upon which they could properly rest their verdict, and no error of law having, as we think, been committed, it must be ruled that the verdict was not contrary to law. Judgment affirmed. All the justices concurring.

NOTES.

Abutting Owner—Easement of Access to Property.—The statement made in the principal case that the right of access to and from a city street is a property right of abutting proprietors requires some qualification and explanation. The constitution of Georgia contains a provision to the effect that private property shall not be taken or *damaged* for public purposes except upon due compensation. Under this provision it was sufficient for the plaintiff to show *damage* in order to recover, and the question

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whether the easement of access is such a right in the nature of an incorporeal hereditament, the destruction of which would constitute a taking of property, was not necessary to the decision of the case. In the cases cited, City of Atlanta *v.* Green, 67 Ga. 386, and Pause *v.* City of Atlanta, 98 Ga. 92, 26 S. E. Rep. 489, the abutting owners were held entitled to compensation for the impairment or their means of access by the grading of the streets, the court basing the right of such recovery on the constitutional provision above referred to.

It is believed that in no actual decision, save in the single state of Ohio, has a municipal corporation been held to a common-law liability for the destruction of an abutting owner's easement of access by grading or otherwise improving its streets, so long as it did not subject the street to other than proper street uses.

It is not uncommon to find it laid down that, "the owner of property abutting on a public highway is entitled, as one of the primary incidents of his ownership, to the right of free ingress and egress, whether he own the fee in the street, or whether the fee be in the city, and that this right is a species of private property, of which the owner may not be deprived without due compensation" (1 Am. & Eng. Enc. Law, 2nd Ed., 225). In support of this proposition any number of authorities are cited; but upon examination of those cases it will be found that they comprise two distinct lines of decision, which go to support the two propositions following:

(1.) Private or Quasi Public Corporation.—As against a railway company, or any private or *quasi* public corporation, an abutting owner, whether he owns the fee of the street or not, has an easement of access to and from his property, which is a property right in the *nature* of an incorporeal hereditament to the extent that the destruction or impairment thereof will constitute a taking of private property for which just compensation must be made.

Thus in case of a street railway, while it is not such an additional burden as calls for compensation to an abutting owner, yet where it materially interferes with such owner's access to and from his property, it is such an injury as will enable him to recover as for a taking of his property. Montgomery *v.* Santa Anna, Westminster Ry. Co., 104 Cal. 186, 43 Am. St. Rep. 89.

In Connecticut, see Bradley *v.* New York, etc., Ry. Co., 21 Ct. 293. In Colorado, see Gilbert *v.* Gauley, S. L. & P. Ry. Co., 13 Colo. 561, 22 Pac. Rep. 814.

So in Indiana, in B. & W. Ry. Co. *v.* Eberle, 110 Ind. 542, 11 N. E. Rep. 467, it is said: "Whatever may be the rule of decision elsewhere, nothing is better settled than that the owners of lots abutting on a street may have a peculiar and distinct interest in the easement in the street in front of their lots. This interest includes the right to have the street kept open and free from any obstruction which interferes with the ordinary means of ingress to and egress from the lots..... To the extent that the street is a necessary and convenient means of access to the lot, it is as much a valuable property right as the property itself. It cannot therefore be perverted from the uses to which it was originally dedicated, nor devoted to uses inconsistent with street purposes without the abutting lot owner's consent, until due compensation be first made according to law for any

injury or damage which may directly result from such interference; nor can the street be invaded so as to inflict special and peculiar damages or injury upon the adjacent lot owner's property without rendering the wrongdoer liable for such damage." And so a lot owner is entitled to recover against a railway company for obstructing an alley, thereby cutting off and rendering more difficult the means of access to his property, and this though there are other means of access open to him. Pennsylvania Company *v.* Stanley (Ind.), 37 N. E. Rep. 288. And in Protzman *v.* Indianapolis, etc., R. R. Co., 9 Ind. 467, 68 Am. Dec. 650, it is said: "The council has a right to establish the grade of the streets of the city and improve them accordingly as streets for the accommodation of the inhabitants; and if this was done in a careful manner, the owners of lots upon the streets had no right to damages accruing from such improvements..... But the city council cannot authorize a railroad company to take or injure the property of a citizen. That is not a part of the duty of the council in relation to grading streets, etc., in the proper sense of the term"—the damage in this case was caused by the company elevating the grade of the street in front of plaintiff's property and laying a track upon such grade, thereby impairing the access to and from plaintiff's lot. See also, Pittsburg, etc., R. R. Co. *v.* Noftsger (Ind.), 47 N. E. Rep. 332; Evansville, etc., Ry. Co. *v.* Chorttor, 6 Ind. App. 56, 33 N. E. Rep. 129; Egbert *v.* Lake Shore Ry. Co., 6 Ind. App. 350, 33 N. E. Rep. 659. But under a provision in the Indiana constitution giving, a remedy by due course of law for *every* injury to property, a railway company was held not to be liable for extending its sheds and tracks so as to close a street *at a distance* from plaintiff's premises, thereby cutting off access from that direction, but leaving him free ingress and egress in other directions. Dantzer *v.* Indianapolis, etc., Ry. Co. (Ind.), 39 N. E. Rep. 223.

In Illinois, in the case of Indianapolis, Bloomington, etc , Ry. Co. *v.* Hartley, 67 Ill. 439, 16 Am. Rep. 624, it is said: "By reason of excavating for the track of appellant's road, the grade in front of appellee's residence had to be materially lowered, so that ingress and egress by carriages from the street were rendered impracticable, and were made far more difficult for persons on foot than it had formerly been..... The damages sustained by the appellee are marked and appreciable, and there is no reason why judgment should not be affirmed." See also, Stone *v.* Fiarbury, Pontiac & N. W. Ry. Co., 68 Ill. 394, 18 Am. Rep. 556; Regney *v.* City of Chicago, 102 Ill. 64.

In Kansas, see Atchison, etc., Ry. Co. *v.* Luening, 52 Kan. 732, 35 Pac. Rep. 801; Same *v.* Church, 53 Kan. 621, 36 Pac. Rep. 979. In Iowa, see Morgan *v.* Des Moines, etc., Ry. Co., 64 Iowa 589, 21 N. W. Rep. 96; Leas *v.* Same, *Id.*

In Kentucky, in Lexington & Ohio R. R. Co. *v.* Applegate, 8 Dana 289, 33 Am. Dec. 502, the court say: "The owners and occupants of houses and lots on Main street have a peculiar interest in that street, which neither the local nor the general public can pretend a right to claim, a private right of the nature of an incorporeal hereditament, legally attached to their contiguous ground—an incidental title to certain facilities and franchises assured to them by contract and by law..... The commonwealth, with all her sovereign right of eminent domain, cannot

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take away private property, even for the most imperious or important public use, without either the owner's consent, or the payment to him of a just equivalent in money." But that the court does not mean to give to this language the broad effect that it would otherwise seem to have, appears from the following found elsewhere in that same opinion: "The mayor and council, holding the legal title to the streets of Louisville in trust chiefly for public purposes, might regrade and improve those streets, or authorize the public use of them, in any mode consistent with the objects to which they were first dedicated, without obtaining the consent of the owners of lots thereon, and without making compensation to them." And so in Elizabeth, Lexington & Big Sandy R. R. Co. *v.* Combs, 10 Bush 382, 19 Am. Rep. 67, where a railroad was laid in a street so narrow that vehicles could not be driven thereon while trains were passing, and the abutting owner's right to use the street as a means of ingress and egress was well-nigh destroyed, it was held that recovery could be had against the company.

See also, Louisville & F. R. Co. *v.* Brown, 56 Ky. (17 B. Mon.) 763; Cosby *v.* Owensboro R. R. Co., 73 Ky. (10 Bush) 288; Maysville & B. S. R. Co. *v.* Ingram, 30 S. W. Rep. 8; Newport & C. Bridge Co. *v.* Foote, 73 Ky. (9 Bush) 264.

In Maryland, see O'Brien *v.* Baltimore Belt Ry. Co., 74 Md. 363, 22 Atl. Rep. 141, 13 L. R. A. 126; Baltimore Belt Ry. Co. *v.* McColgan, 83 Md. 650, 35 Atl. Rep. 59.

In Massachusetts, see Proprietor Locks & Canals *v.* Nashua, etc., Corp., 64 Mass. (10 Cush.) 385.

So in Mississippi it is held that an abutting owner may recover against a railway company for impairing and obstructing his means of egress and ingress and otherwise damaging his property. Theobold *v.* L. N. O. & T. Ry. Co., 66 Miss. 279, 14 Am. St. Rep. 564.

So in Michigan an abutting lot owner was held entitled to recover against a railroad company for obstructing his means of ingress and egress by loading and unloading and standing cars upon a side track in the street. Grand Rapids & Indiana R. R. Co. *v.* Heisel, 38 Mich. 62, 31 Am. Rep. 306. See also, Taylor *v.* Bay City St. Ry. Co., 101 Mich. 140, 59 N. W. Rep. 447.

In Missouri the law was at first laid down the other way. Thus in Gaus & Sons Mfg. Co. *v.* Railroad Co., 113 Mo. 308, 35 Am. St. Rep. 706, it was held:

(I.) That the laying of a steam railway in a street is not an additional burden thereon, nor is it subjecting the street to a public use not contemplated in a general grant or dedication.

(II.) Interference with the access to and from the lots of an abutting owner in such case is not a taking or damaging of private property within the meaning of a constitutional provision against taking or damaging private property for public purposes without due compensation.

In Lockwood *v.* Wabash R. R. Co., 122 Mo. 86, 43 Am. St. Rep. 547, the court shows signs of coming around. They say: "But where the use of a street by a steam railway amounts to a monopoly thereof, and to the total destruction of abutting owner's access to and from that street, it is a damaging of property for which he may recover against the company." And, in Sherlock *v.* Kansas City Belt Ry. Co., 142 Mo. 172,

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64 Am. St. Rep. 551, in which case a railroad track was laid in a narrow alley, leaving only three feet and a half on each side of the track, the court lays it down strongly: "Abutting owners have the right appurtenant to their property of access to it over the adjacent streets and alleys, and this right is as inviolable as the right to the property." See also, Locklord *v.* North Missouri R. Co., 31 Mo. 180; Porter *v.* Same, 33 Mo. 128; Locklord *v.* Same, 34 Mo. 259; Spencer *v.* Metropolitan St. Ry. Co., 120 Mo. 154, 23 S. W. Rep. 126, 22 L. R. A. 608; Reede *v.* City of St. Louis, 93 Mo. 408, 6 S. W. Rep. 257; Fairchild *v.* Same, 97 Mo. 85, 11 S. W. Rep. 60; Cannon *v.* Same, 97 Mo. 92, 11 S. W. Rep. 60.

In Minnesota, the company was held liable for damages done to the plaintiff's property in the destruction of his easement of access by means of an excavation seven feet deep and thirty-five feet wide. Brakken *v.* Minneapolis & St. Louis Ry. Co., 29 Minn. 41, 7 Am. & Eng. R. Cas. 593. See also, Adams *v.* Chicago, etc., Ry. Co., 39 Minn. 286, 12 Am. St. Rep. 644, and Newell *v.* Minneapolis, etc., Ry. Co., 35 Minn. 112, 59 Am. Rep. 303. See also, Rochette *v.* Chicago, etc., Ry. Co., 32 Minn. 201, 20 N. W. Rep. 140; Shanbut *v.* St. Paul & S. C. R. Co., 21 Minn. 502; Bornum *v.* Minn. Transfer Ry. Co., 33 Minn. 365, 23 N. W. Rep. 538.

In Nebraska, in a case where the street was obstructed by a railroad and by cars standing, loading and unloading on side tracks therein, impairing and making inconvenient access to and from plaintiff's premises, the court uses the following language: "We therefore hold that municipal authorities have no power to grant authority to permanently obstruct a street unless compensation be made to lot owners abutting thereon who suffer special damage by such obstruction." Burlington & Missouri Ry. Co. *v.* Reinhackle, 15 Neb. 279, 48 Am. Rep. 342; also, Chicago K. & N. Ry. Co. *v.* Hagles, 26 Neb. 364, 42 N. W. Rep. 93; Sioux City & P. R. Co. *v.* Weimer, 16 Neb. 272, 20 N. W. Rep. 349.

So, in North Carolina, subject to the right of the city to grade its streets or improve them in any way for proper street purposes, the abutting owner has a proprietary right—an easement of access in the street, which is as much property as the lot itself, and the impairment or destruction thereof by a railway company is a taking of private property. White *v.* Northwestern N. C. R. R. Co., 113 N. Car. 610, 37 Am. St. Rep. 639. In New Jersey, see Sullivan *v.* North Hudson County Ry. Co., 51 N. J. L. (22 Vroom) 518, 18 Atl. Rep. 689.

In New York, an abutting owner has a right or easement of access in the bed of the street, a proprietary right which constitutes private property within the meaning of the constitution, and of which he cannot be deprived without compensation when the street is subjected to a servitude inconsistent with its use as a public street. Story *v.* New York Elevated R. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; Abendroth *v.* Manhattan R. R. Co., 122 N. Y. 1, 19 Am. St. Rep. 461. And, in Mahady *v.* Bushwick R. R. Co., 91 N. Y. 148, 43 Am. Rep. 661, upon a complaint alleging special damage sustained by the cutting off of access to plaintiff's lot, it is said: "A street cannot be converted into a yard for the storing or deposit of cars to the injury of adjoining owners. An unreasonable use of a street by a street railway may doubtless afford a right of action to the property owners specially injured thereby." Also,

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Kellinger *v.* 42d & G. St. Ferry R. Co., 50 N. Y. 206; Reining *v.* New York, L. & W. R. Co., 128 N. Y. 157, 623, 28 N. E. Rep. 640, 14 L. R. A. 133, 13 N. Y. Supp. 238; *In re* N. Y. & Hudson River Ry. Co., 39 Hun 338.

In Ohio, in Railway Company *v.* Lawrence, 38 Ohio St. 41, 43 Am. Rep. 419, it is said: "The established doctrine in this state is that the abutting owners have a peculiar interest in the street, which neither the local nor the general public can pretend to claim; a private right of the nature of an incorporeal hereditament, legally attached to their contiguous grounds and the erections thereon; an incidental title to certain facilities and franchises assured to them by contract and by law, and without which their property would be of little value. This easement, appended to the lots, unlike any right of one lot owner in the lot of another, is as much property as the lot itself." And, see also, Branahan *v.* Hotel Co., 39 Ohio St. 333, 48 Am. Rep. 457, where it is held that the right of access to a street cannot be destroyed by the city appropriating the street at that place to a private company for a hackstand. See generally, Little Miami R. R. Co. *v.* Naylor, 2 Ohio St. 235; English *v.* Trustees of Cincinnati So. R. Co. (D. C.), 8 Wkly. Law Bul. 15; Harrison *v.* Mt. Auburn Cable Co., 9 Ohio S. & C. P. Dec. 805, 17 Wkly. Law Bul. 265; Fliehman *v.* Cleveland, etc., Ry. Co., 11 Ohio S. & C. P. Dec. 543, 27 Wkly. Law Bul. 302.

So, in Oregon, the law is thus laid down: "Any proper exercise of governmental power over a city street for street purposes, which does not directly encroach upon the abutting property of an individual, though the consequences may be to impair its use, is not a taking within the meaning of the constitution and will not entitle the adjoining owner to compensation or give him a right of action. Cooley Const. Limns., 5th Ed. 671. But an abutting owner is entitled to the street in front of his property to its full width as a means of ingress and egress, and this right is as much property as the soil within the boundaries of his lot; and any impairment thereof or interference therewith, caused by the use of the street for other than legitimate street purposes, is a taking within the meaning of the constitution whether the fee of the street is in the abutting owner or not." Williamette Iron Works *v.* Oregon Ry., etc., Co., 26 Ore. 224, 46 Am. St. Rep. 620.

In Pennsylvania, see Struthers *v.* Dunkirk, W. & P. R. Co., 87 Pa. St. 282; Pennsylvania R. R. Co. *v.* Lippincott, 116 Pa. St. 472, 9 Atl. Rep. 871, 2 Am. St. Rep. 618; Beck *v.* Erie Terminal Ry. Co. (Con. Pl.), 11 Pa. Co. Ct. R. 363; Philadelphia, etc., Ry. Co. *v.* Patent, 5 Atl. Rep. 747; Pennsylvania, etc., Co. *v.* Pennsylvania S. V. R. Co., 151 Pa. St. 334, 25 Atl. Rep. 107, 31 Wkly. N. C. 30, 31 Am. St. Rep. 762. In South Carolina, see McLaughlin *v.* Charlotte & S. C. R. Co., 5 Rich. Law 583.

In Texas, in a case where a street railroad was laid in a street so narrow that an abutting owner was unable to load and unload goods without interfering with the running of the cars, it was held that he might delay their passage for a reasonable length of time while his wagons were loading and unloading. San Antonio Rapid Transit Company *v.* Limburger, 88 Texas 79, 53 Am. St. Rep. 737.

In Wisconsin, see Hegor *v.* Chicago & N. W. Ry. Co., 26 Wis. 624. In the federal court, see Grafton *v.* B. & O. Ry. Co. (C. C.), 21 Fed. Rep. 309; Jackson *v.* Chicago, etc., Ry. Co. (C. C.), 41 Fed. Rep. 656.

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(2.) **Municipal Corporations.**—As against a municipal corporation, an abutting owner's easement of access is not such a property right that the destruction or impairment thereof by the city, in the grading and improving of its streets for any proper street purpose, will constitute a taking of private property within the meaning of a constitutional prohibition against the mere *taking* of property; and a municipal corporation is never liable in such case in the absence of a constitutional or statutory provision prohibiting the *damaging* as well as the *taking* of private property without just compensation.

Thus, in Alabama, it is held to be an improper street use for a city council to appropriate a part of a street for a "hackstand," and a proprietor of a hotel may enjoin such use when it prevents and obstructs him and the guests of the hotel in the reasonable access to and egress from the hotel, and in the transportation of baggage, to their great inconvenience and to his injury. City Council of Montgomery *v.* Parker, 114 Ala. 118, 62 Am. St. Rep. 95. Also, City Council of Montgomery *v.* Townsend, 80 Ala. 489, 2 So. Rep. 155, 60 Am. Rep. 112.

In Connecticut, an abutting owner whose means of access are destroyed or impaired by the city in grading and improving its streets, may recover for the injuries sustained under a general statute providing for the compensation of abutting owners in such cases. Shelton Company *v.* Borough of Birmingham (Ct.), 26 Atl. Rep. 348; Holley *v.* Town and Borough of Torrington (Ct.), 28 Atl. Rep. 613; Platt *v.* Town of Milford (Ct.), 34 Atl. Rep. 82; Cook *v.* City of Ansonia (Ct.), 34 Atl. Rep. 183; McGor *v.* Borough of Bristol (Ct.), 42 Atl. Rep. 1000.

In Colorado, under a constitutional provision against the taking or damaging of private property without due compensation, a city was held liable to an abutting owner for cutting off access to his property along a frontage of five acres by means of an impassable ditch or canal excavated in the street for the purpose of conveying water to the city. Town of Longmont *v.* Parker, 14 Colo. 386, 20 Am. St. Rep. 277.

In Florida, the constitution prohibits only the *taking* of private property without due compensation. Under this provision, in Dorman *v.* City Council of Jacksonville, 13 Fla. 538, 7 Am. Rep. 253, a demurrer to appellant's declaration was overruled on the ground that while the city would not be liable if it proceeded properly, yet appellant's declaration charged the city with proceeding *improperly*, "contriving and unjustly intending to injure, prejudice, and aggrieve the plaintiff, and to incommode and annoy him, dug away his sidewalk, etc.," such acts constituting a ground of action at common law. And under this same provision, where plaintiff's means of ingress and egress were impaired by a viaduct constructed by the city, it was held that no recovery could be had. Selden *v.* City of Jacksonville, 28 Fla. 558, 29 Am. St. Rep. 278.

In Georgia, in Green *v.* City of Atlanta, 67 Ga. 386, the court takes notice of the fact that prior to the adoption of the constitution of 1877 the constitution of Georgia contained a provision against the *taking* of property only, but that in the constitution adopted in that year, there was added a further provision against the *damaging* of property, and under this provision plaintiff was entitled to recover. See also, City Council of Augusta *v.* Schrameck, 96 Ga. 426, 23 S. E. Rep. 400; Estes *v.* Mayor and Council of Macon, 103 Ga. 780, 30 S. E. Rep. 246; Moore *v.*

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City of Atlanta, 70 Ga. 611. And, in Pause *v.* City of Atlanta, 98 Ga. 92, 26 S. E. Rep. 489, it is held that a *lessee* of premises abutting on a city street, all access to and from which is cut off by a public improvement (bridge and abutments), is entitled to compensation for the injury sustained.

In Indiana, in a case where all means of access to plaintiff's property were destroyed by the grading of the street, it is said that at common law the plaintiff would be remediless, it being *damnum absque injuria*; but under the statute in such case made and provided, recovery may be had. City of La Fayette *v.* Nagle, 113 Ind. 425, 15 N. E. Rep. 1. See also, Macy *v.* City of Indianapolis, 17 Ind. 267; Weis *v.* City of Madison, 75 Ind. 241.

In that state the plaintiff must bring his case strictly under and within the words of the statute in order to recover. Thus, in Keehn *v.* McGillicuddy (Ind.), 44 N. E. Rep. 554, it was held that plaintiff could not recover for damage caused by the establishing of a street grade for the first time, the statute in terms awarding compensation only for injuries occasioned by the *regrading* of the street. And, in Baker *v.* Town of Shoals (Ind.), 33 N. E. Rep. 664, a plaintiff, whose means of ingress and egress were destroyed by the grading of the street, was held not entitled to recover, the statute applying only to cities and not to towns. As to right of recovery under the statute, see also, City of Jeffersonville *v.* Myers, 2 Ind. App. 532, 28 N. E. Rep. 999; City of Anderson *v.* Bain, 120 Ind. 254, 22 N. E. Rep. 323.

But in Illinois, under a constitutional provision prohibiting either the taking or damaging of property without compensation, it was held that a plaintiff could not restrain a city from closing a street at a point some distance from his property. Chicago *v.* Union Building Association, 102 Ill. 379, 40 Am. Rep. 598. See also, Parker *v.* Catholic Bishop of Chicago (Ill.), 34 N. E. Rep. 473. And under this same provision a city is not liable for obstructing the access to plaintiff's property by a temporary structure in a navigable river. Northern Transportation Company *v.* Chicago, 99 U. S. 635. Where plaintiff's means of ingress and egress are entirely destroyed by grading the street, recovery may be had under such provision. City of Joliet *v.* Blower (Ill.), 40 N. E. Rep. 619. That there is no common-law liability in such case, see Nevins *v.* City of Peoria, 41 Ill. 502, 89 Am. Dec. 392, where it is said: "That a city has absolute control over the grade of its streets, that it can make the grade light or heavy, that it can elevate or lower it at pleasure, and that the owners of adjacent lots cannot call it to account for errors of judgment in these respects, or demand damages because they may incur inconvenience or expense in adjusting the level of their own premises to that of the street, for the purpose of ingress and egress, are propositions not to be denied." See also, City of Elgin *v.* Eaton, 8 Ill. 535, 25 Am. Rep. 412, 2 Ill. App. (2 Brodw.) 90; Bloomington *v.* Pollock, 141 Ill. 346, 31 N. E. Rep. 146. In Iowa, see Millord *v.* City of Webster City, 84 N. W. Rep. 1044.

In Massachusetts, under the statute in such case made and provided, a city is liable to an abutting owner for obstructing his means of ingress and egress by raising the grade of the street in front of his premises. Woodbury *v.* Inhabitants of Beverly, 153 Mass. 245, 26 N. E. Rep. 851.

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See also, Beale *v.* City of Boston, 166 Mass. 53, 43 N. E. Rep. 1029; Stanwood *v.* City of Malden, 157 Mass. 17, 31 N. E. Rep. 702, 16 L. R. A. 591.

In New Jersey, in Clark *v.* City of Elizabeth (N. J.), 40 Atl. Rep. 616, the court uses the following language: "The constitution forbids the taking of private property for public use without compensation. The only exception to this rule is that under certain circumstances, and in the absence of liability imposed by statute, municipal corporations might take or injure private property without any liability to make compensation. This immunity does not extend to persons or other corporations, although the latter be created for public purposes; and the destruction of private property either total or partial, or the diminution of its value by the act of government directly, and not merely incidentally affecting it, which deprives the owner of the ordinary use of it, is a taking within the constitutional provision, and can only be exercised under the right of eminent domain on just compensation made..... At common law a municipality was not liable to abutting owners for damages caused by changes in the grade of streets, and such is the law at the present time unless liability is imposed by express statutory authority." Liability in such case is now imposed by statute in that state.

In New York, under authority from the legislature, a city may close one or several different means of access (the plaintiff still having some means of access left) without making compensation. Kings Co. Fire Ins. Co. *v.* Stevens, 101 N. Y. 411, 5 N. E. Rep. 353. In the absence of constitutional or statutory liability, an abutting owner has an easement of access to and from the street, a proprietary right which is as much property as the soil in the lot itself; but this is subordinate to the right of the city to grade or improve the street, or to use it for any proper street purpose. City of Buffalo *v.* Pratt, 131 N. Y. 293, 27 Am. St. Rep. 592. See also, Radcliff *v.* Mayor, etc., of Brooklyn, 4 N. Y. (4 Comstock) 195, 53 Am. Dec. 357; Watson *v.* City of Kingston, 114 N. Y. 88, 21 N. E. Rep. 102. Under statute providing compensation for injury done by grading, the city was held not to be liable where it graded a street, leaving an embankment ten feet wide between plaintiff's property and the street, which embankment, in the course of time, was dug away by the street commissioner, a load or two at a time, and by any one else who wanted a load of sand. Whitmore *v.* Village of Tarrytown (N. Y.), 33 N. E. Rep. 489. Under statute prohibiting change of grade except upon petition of majority of abutting owners and compensation to those injured thereby, the city is liable to damaged proprietors when it makes such change without having been petitioned to do so. Folmsbee *v.* City of Amsterdam (N. Y.), 36 N. E. Rep. 821.

In Ohio, plaintiff recovered against a county for destroying his means of access to and from a public highway by grading the same, the court saying: "Both as to city streets and country roads an abutting owner has an easement of access in the nature of an incorporeal hereditament, and the plainest principles of justice require that compensation be made when this is taken or destroyed." Smith *v.* Board of Commissioners of Wayne County (Ohio), 35 N. E. Rep. 796, citing Crawford *v.* Village of Delaware, 7 Ohio St. 471; City of Akron *v.* Chamberlain Co., 34 Ohio St. 336; Jackson *v.* Jackson, 16 Ohio St. 168. These cases go beyond the common law and are out of line with the decisions elsewhere.

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In Pennsylvania, under statute providing for compensation of an abutting owner for injury done by grading, it was held that impairment of access, etc., are proper matters for consideration; but they are to be considered in comparison with the advantages only as they affect the market value of the land; that is, the measure of damage is the difference between the market value before and after grading. Chambers *v.* Borough of South Chester (Pa.), 21 Atl. Rep. 409. An abutting owner whose easement of access is impaired or destroyed is entitled to recover under constitutional provision against taking or damaging private property, or under statute awarding compensation for damage done by grading. Hobson *v.* City of Philadelphia (Pa.), 24 Atl. Rep. 1048; O'Brien *v.* City of Philadelphia (Pa.), 24 Atl. Rep. 1047. See also, Seaman *v.* Borough of Washington (Pa.), 33 Atl. Rep. 756; Bowers *v.* Borough of Braddock (Pa.), 33 Atl. Rep. 759; Strang *v.* Borough of Braddock (Pa.), 33 Atl. Rep. 760; Berry *v.* Borough of Braddock (Pa.), 33 Atl. Rep. 760, and other cases in connection therewith. See also, Mellor *v.* City of Philadelphia (Pa.), 28 Atl. Rep. 991; Taylor *v.* City of Philadelphia (Pa.), 28 Atl. Rep. 993, and a long list of others in same volume. But plaintiff is not entitled to recover for damage to a building, occasioned by grading, when the building was erected after the grading was authorized. Graff *v.* City of Philadelphia (Pa.), 24 Atl. Rep. 1048.

In Rhode Island, in Gerhard *v.* Seekonk River Bridge Commissioners, 15 R. I. 334, 5 Atl. Rep. 199, the doctrine is thus laid down: "The easement of travel enjoyed by abutting owners is a public easement, and they enjoy it simply as a portion of the public. It is competent for the state, representing the public, to authorize the entire discontinuance of a street, and *a fortiori*, its partial obstruction, at least so long as the abutters have access to and from their estate by other ways. And the abutting owners in such ease are not entitled to damages under a constitutional provision against the *taking* of private property." Under the terms of the Rhode Island statute providing for compensation for injuries done by grading, no damages can be recovered for injuries done by grading the street the first time. Gardiner *v.* Town of Johnson (R. I.), 12 Atl. Rep. 888.

So, in South Carolina, where access to premises was made difficult by grading the street, the court says: "Such a damaging is not a taking of property within the meaning of a constitutional provision which provides that private property shall not be taken for public use without just compensation being first made therefor." Garraux *v.* City Council of Greenville, 53 S. Car. 575, 31 S. E. Rep. 597.

In Virginia, under a constitutional provision against the taking of private property, a city may elevate the grade of its streets and thereby injure or destroy abutting owner's means of access without compensating him—it is *damnum absque injuria*. Kehrer *v.* Richmond City, 81 Va. 745. But where certain members of a city council ordered the grading of a street without council having officially so ordered it, it was held that a cause of action accrued to an abutting owner whose means of ingress and egress were impaired thereby, and that the subsequent ratification of the acts of the individual members, by council in regular meeting assembled, did not take away the abutting owner's cause of action against such individual members. Page *v.* Bevlin, 88 Va. 985, 14 S. E. Rep. 843.

As to Virginia doctrine of right of lateral support against municipalities, see Stearns *v.* City of Richmond, 88 Va. 992, 14 S. E. Rep. 847.

And, in Wisconsin it is said: "So long as there is no application of a street to purposes other than those of a highway, and no diversion of it from street purposes, any change of grade, made lawfully and in good faith for the benefit of the public, using the street as a street, and not made maliciously or for the purpose of doing injury to the abutter, are not within the constitutional provision against taking private property without compensation, nor the basis of an action for consequential damages. A trespass upon or physical invasion of property adjoining the street is necessary to bring municipal authorities, when grading streets, within such constitutional prohibition; and the original and all subsequent purchasers of property abutting on a street take with an implied understanding that the public shall have the right to improve or alter the street for street purposes, and that they can sustain no claim for damages resulting to their property for the impairment or destruction of their incidental rights of ingress and egress, or of light and air as a mere consequence from the use or improvement of the street as a highway. Smith *v.* City of Eau Claire, 78 Wis. 457.

In the United States supreme court, see Smith *v.* Corporation of City of Washington, 20 How. 135–139, where the liability of the city for the destruction of abutter's means of access was urged by council, but is unnoticed in an opinion holding the city not liable for injuries occasioned by grading street. See also, McElrow *v.* Kansas City (C. C.), 21 Fed. Rep. 257.

Destruction of Means of Access—Remedy.—Under statute or ordinance providing that when an abutting owner is damaged by the grading of the street in front of his property he shall be compensated therefor, and providing a specific manner in which the amount of damage is to be ascertained, such remedy is exclusive, and the owner must proceed in accordance therewith. Garraux *v.* City Council of Greenville, 53 S. Car. 575, 31 S. E. Rep. 597.

Same—Rights of Lessee.—See Pause *v.* City of Atlanta, 98 Ga. 92, 26 S. E. Rep. 489.

DORAN

v.

CITY OF SEATTLE.

(*Supreme Court of Washington, March 7, 1901.*)

[64 Pac. Rep. 230.]

Continuing Trespass—Limitations—Plurality of Actions.—A city negligently erected a bulkhead in front of plaintiff's premises, which were injured by the gradual sliding of the bulkhead. The statute of limitations covering suits for such injuries declares that action shall be brought within two years from the time the injury accrued, and another statute requires that notice of claims for injuries against the city

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shall be given within six months after the injury accrued. *Held* that, since the injury constituted a continuing trespass, limitations did not commence to run against an action from the time of the first injury, so as to limit plaintiff to a single action for damages for such injury and all prospective damages, but that plaintiff was entitled to recover for damages accruing within a period equal to the period of limitation prior to the filing of the claim.

Appeal from superior court, King county; E. D. Benson, Judge.

Action by Frank Doran against the city of Seattle. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. E. Humphrey and Edward Von Tobel, for appellant.

John F. Dore, John W. Kelley, James J. McCafferty, and J. S. Mulvey, for respondent.

Dunbar, J. The plaintiff, Frank Doran, alleges that the defendant, the city of Seattle, negligently constructed a bulkhead in front of his premises, and on account of such negligence the bulkhead pressed against and injured his house. This suit was begun on the 24th day of January, 1898. The plaintiff's claim for damages was filed on the 13th day of September, 1897. On the trial, after the plaintiff had introduced his evidence, motion for nonsuit was made by defendant and denied by the court. The jury returned a verdict in favor of the plaintiff.

The question involved in this appeal is in relation to the statute of limitations, and that question is raised by the following instructions asked by the defendant: "The plaintiff can have but one cause of action for damages under the facts of this case, and in the one action the plaintiff is entitled to recover for all damages, if at all, sustained by him, both past and prospective. The cause of action, if any, accrued to the plaintiff at the time of the first damages—no matter how small they may have been—that he sustained; and unless a claim for past and prospective damages was presented to the city council and filed with the clerk of the defendant within six months after the time the cause of action accrued, and the action was commenced within two years after the first damages were sustained, there can be no recovery, and your verdict must be for the defendant." "The statute requires actions for damages such as are claimed in the complaint to be commenced within two years after the right of action has accrued. If you find that the damages accrued to plaintiff's property more than two years before the commencement of this action, no matter how small that damage may have been, then the whole claim is barred by the statute of limitations, and your verdict must be for the defendant. The law will not permit the plaintiff to split his cause of action, and to recover by piecemeal; but he must recover, if at all, for all

damages, past and prospective, in one single action." These instructions the court refused to give, but instructed as follows: "If you believe, from a preponderance of the evidence in this case, that in building and maintaining the bulkhead in question the defendant has not used such care as ordinarily prudent city officials, having similar work in charge, generally exercise in erecting and maintaining entirely similar bulkheads, and that through such failure the house of plaintiff was, within six months immediately prior to the giving of this notice of claim of plaintiff to defendant, injured by the gradual sliding of said bulkhead, then your verdict will be for plaintiff in one such gross sum as will, in your opinion, from the evidence, just compensate plaintiff for such injury as so accrued within said six months immediately prior to the filing of said plaintiff's claim with defendant." It is insisted by the appellant that, according to the instructions given by the court, the statute of limitations began to run from the time the injury ceased, and not from the time the right of action accrued; that the case was tried upon this theory, which was an erroneous one.

Passing the question of the legality of the statute in relation to the presentation of claims before the commencement of the action and within a certain time after the damages had occurred, we will proceed to the main question involved, which is decisive of the case, granting, for the sake of argument, that the filing of the claim was necessary. There are a few cases which support the theory of defendant that the statute of limitations begins to run from the inception of the injury. In Powers v. City of Council Bluffs, 45 Iowa, 652, it was held that whenever a nuisance is of such a character that its continuance is necessarily an injury, and when it is of a permanent character, that will continue without change from any cause but human labor, then the damage is an original damage, and may be at once fully compensated. In Town of Troy v. Cheshire R. Co., 23 N. H. 83, the same doctrine was announced, although in that case it was held that if the act done was not necessarily injurious, or if it was contingent whether further injury would arise, the plaintiff could recover damages only to the date of his writ. In this connection it might be said that it would be difficult to tell in the case at bar whether the injury would continue, and, if so, to what extent. In Fowle v. New Haven & N. Co., 107 Mass. 352, it was held that a judgment against a railroad corporation for damages, not limited to those actually suffered at the date of the writ, for locating and constructing their road on the bank of a river, so as to divert its course and cause it to wash away the plaintiff's land, is a bar to a like action by him against them for subsequent damages from the same cause. But it will be observed that in this case the decision was placed upon the ground that the damages in the other case had not been limited to those suffered at the date of the writ, and the rule

contended for by the appellant cannot be said to have been adopted in Massachusetts, as, in the subsequent case of Prentiss v. Wood, 132 Mass. 486, it is held that an action for damages sustained within six years by the wrongful continuance of a dam is not barred by the statute of limitations, although the dam was erected without right more than six years before the date of the writ; the court in that case saying: "The ground taken by the defendants, that these suits are barred by the statute of limitations, cannot be maintained. A person who continues a nuisance is liable to successive suits, each continuance being a new nuisance; and therefore the plaintiff in these actions is entitled to recover for all damages accruing after the award above referred to, it being within six years of the date of his writs,"—citing Hodges v. Hodges, 5 Metc. (Mass.) 205. The same doctrine was announced in Wells v. New Haven & N. Co., 151 Mass. 46, 23 N. E. 724, and the question of permanency, upon which some of the courts have distinguished the cases, was discussed as follows: "If the defendant's act was wrongful at the outset, as the jury have found, we see no way in which the continuance of its structure in its wrongful form could become rightful, as against the plaintiff, unless by release or grant, by prescription, or by the payment of damages. If originally wrongful, it has not become rightful merely by being built in an enduring manner." And the court noticed the decision in Fowle v. New Haven & N. Co., supra, and distinguished it from the case it was then deciding by saying: "The plaintiff [in that case] had brought a former action in which he expressly declared for prospective damages, and he was allowed by the court to recover them, apparently without any objection on this ground from the defendant; and if he had been allowed to hold his second verdict he would have got double damages, which clearly was not permissible. The decision of that case does not necessarily imply that an action must have been brought within six years, or, if it does, we cannot follow it."

The case upon which appellant largely relies is that of City of North Vernon v. Voegler, 103 Ind. 314, 2 N. E. 821, and the opinion, having been written by Judge Elliott, who is recognized by the bar of this country as a learned author and jurist, demands particular attention. In that case it was squarely held that in an action for injury to real estate caused by the negligence of corporation officers in constructing a public work of a permanent character, as the grading of a street, all damages, past and prospective, can be recovered in one action; that they must be recovered in one suit; and that for fresh damages resulting from the original wrong a second action cannot be maintained. A very vigorous opinion is written in that case, but, with due deference to the eminent judge who wrote the opinion, we are inclined to think that both reason and authority concur in overruling the rule there announced.

In Uline v. Railroad Co., 101 N. Y. 98, 4 N. E. 536, where an elaborate and painstaking investigation of this question was indulged in, and the authorities collated, it was decided that where a railroad is unlawfully constructed in a street, in an action by an adjacent owner to recover damages, he is entitled to recover simply the damages thereafter sustained up to the commencement of the action, and that for any damages thereafter sustained other actions might be brought successively until the nuisance should be abated. In the discussion of this question Judge Earl, who wrote the opinion for the court, in noticing the case of City of North Vernon v. Voegler, supra, and after discriminating that case to a certain extent from the one in question, said: "But the case is also inferentially authority for the second ground of error upon which I have based my conclusion. * * * But I am of opinion that that decision is clearly unsound as to the precise question adjudged. What right was there to assume that the street would be left permanently in a negligent condition, and then hold that the plaintiff could recover damages upon the theory that the carelessness would forever continue? A municipality or a railroad corporation under proper authority may erect an embankment in a street, and, if the work be carefully and skillfully done, it cannot be made liable for the consequential damages to adjacent property; but, if it be carelessly and unskillfully done, it can be made liable. It may cease to be careless, or remedy the effects of its carelessness, and it may apply the requisite skill to the embankment; and this it may do after its carelessness and unskillfulness, and the consequent damages, have been established by a recovery in an action. The moment an action has been commenced, shall the defendant in such a case be precluded from remedying its wrong? Shall it be so precluded after a recovery against it? Does it establish the right to continue to be a wrongdoer forever by the payment of the recovery against it? Shall it have no benefit by discontinuing the wrong, and shall it not be left the option to discontinue it? And shall the plaintiff be obliged to anticipate his damages with prophetic ken, and foresee them long before—it may be many years before—they actually occur, and recover them all in his first action? I think it is quite absurd and illogical to assume that a wrong of any kind will forever be continued, and that the wrongdoer will not discontinue or remedy it, and that the convenient and just rule, sanctioned by all the authorities in this state and by the great weight of authority elsewhere, is to permit recoveries in such cases by successive actions until the wrong or nuisance shall be terminated or abated." And it may be added that, under the logic of the doctrine announced in the Indiana case, the wrongdoer might, by the payment of prospective damages, actually become permanently possessed of real property which, under the theory of the law, can only be taken by corporations under the provisions of the law in relation to eminent domain.

In addition to this, the rule is inequitable, in that the damages in the first instance and before the statute of limitations expires may be so trifling that it would not justify litigation. It would be inequitable, and not in accordance with good morals, to estop a person from obtaining his rights or damages for injuries which might eventually become burdensome because he was not litigious enough to plunge into a lawsuit over a trifling matter.

It is said by the appellant that the cases cited above are not in point, for the reason that the wrongs committed were nuisances; but an examination of all the many cases on this subject shows that they are treated in all instances as nuisances when they are wrong, and that the construction of that which is originally legal and right, if wrongfully constructed and maintained, may become a nuisance. Under the title, "Trespasses Resulting in Continued Nuisances," it is said in 5 Am. & Eng. Enc. Law, p. 17: "The rule here is a combination of the two rules just given. The institution of the wrong is treated as a trespass, while the continuance of it is treated as a nuisance. The damages for the original act of trespass are all to be recovered in the first action, but successive actions must be brought to recover for damages for the continuation of the wrongful condition, and in these the damages are estimated only to the date of the bringing of each suit." In Aldworth v. City of Lynn (Mass.) 26 N. E. 229, 10 L. R. A. 210, the rule of continuing damages was announced; the contention of the plaintiff in that case being that, if the damage resulted from a cause which was either permanent in its character or which was treated as permanent by the parties, it was proper that the entire damages should be assessed with reference to past and probable futures. The attorney in that case cited Fowle v. New Haven & N. Co., supra, and Troy v. Cheshire R. Co., supra; and the court in its opinion said: "So far as there are intimations in the opinion of Fowle v. New Haven & N.Co. which seem to make the case an authority for the plaintiff's contention in the case at bar, we are not inclined to follow them." In Mayor, etc., v. Comar (Tenn. Sup.) 12 S. W. 1027, 7 L. R. A. 465, it was held that damages for an alleged negligent construction of a sewer, in consequence of which plaintiff's premises are injured by discharge therefrom, must be limited to the actual damage sustained up to the time of bringing suit, and cannot include prospective damages on the ground that the defects are permanent, although human labor will be necessary to remedy the defects. In this case the same cases were cited, viz. Troy v. Cheshire R. Co., supra, and Powers v. City of Council Bluffs, supra, to sustain the doctrine that all the damages must be included in one suit; and the court, in passing upon that question, after laying down the rule that damages could be assessed only up to the time of the writ, and after reviewing the arguments in the cases cited to sustain the

opposite contention, among other things said: "This seems to us an artificial and arbitrary test. There are supposable nuisances which by the effect of time might at last abate themselves; but by far the greater number of trespasses, wrongs, and nuisances would continue indefinitely, without the expenditure of human labor to remove or abate them. It is a rule which does not recommend itself by either its reasonableness, its certainty of application, or its justice." And, after noticing the rule announced in Troy v. Cheshire R. Co., supra, and Powers v. City of Council Bluffs, supra, it continued: "Thus the application of the rule now contended for would require a plaintiff to foresee all the possible results, and to convince a jury of what he, with prophetic ken, is required to foresee, on penalty of subsequently having to quietly endure consequences which he could not reasonably have conjectured as likely to result from what at first seemed a trifling injury. The cases of North Vernon v. Voegler, 103 Ind. 314, 2 N. E. 821, and Fowle v. New Haven & N. Co., 112 Mass. 334, have been examined, and we find that they do measurably support the contention of defendants in error. None of these cases are satisfactory in their reasoning, and the decided weight of authority is opposed to them." See, also, Blunt v. McCormick, 3 Denio, 283; Greene v. Railroad Co., 65 How. Prac. 154; Powers v. Ware, 4 Pick. 105; McGuire v. Grant, 25 N. J. Law, 356; Schell v. Plumb, 55 N. Y. 592; Mohon v. Railroad Co., 24 N. Y. 658.

The rule contended for by appellant, it seems to us, would work unnecessary hardship, is fraught with doubt and uncertainty in its application, and we are not inclined to adopt it. The instructions of the court were without error, and the judgment is therefore affirmed.

Reavis, C. J., and Fullerton and Anders, JJ., concur.

In re MAYOR, ETC., OF CITY OF NEW YORK.

(*Court of Appeals of New York, April 16, 1901.*)

[60 N. E. Rep. 180.]

Streets—Discontinuance—Filing Maps and Plans.—The filing of maps and plans under Laws 1890, c. 545, providing for the making and filing of maps and plans of streets and avenues in certain wards in New York City by the commissioner of street improvements, which, when filed and approved, should be conclusive of location, grade, etc., of streets exhibited thereon, being subsequent to the taking effect of Laws 1895, c. 1006, discontinues and closes a street traced thereon and marked as discontinued, under section 2 of said act, providing that local authorities authorized to lay out and improve streets and to make and file a map or plan shall, on any such map or plan, designate only the streets

which they may determine to so lay out, extend, or otherwise improve as permanent streets, and providing that the streets shown thereon should be the only lawful streets, if the discontinued streets were not actually in use.

Same—Same—Irregularities.—Where the newly laid out streets were traced on the maps filed in one color, and the discontinued streets in another, it was a substantial compliance with Laws 1895, c. 1006, § 2, requiring the discontinued streets to be omitted from the maps.

Statute.—Laws, 1896, c. 712, cured any irregularities in the manner of making the maps required under Laws 1890, c. 545, on discontinuance of streets in the city of New York.

Appeal from supreme court, appellate division, First department.

In the matter of the application of the mayor, aldermen, and commonalty of the city of New York relative to acquiring title to Morris avenue from Tremont avenue to Park View Terrace. From an order denying the motion of Theodore Sattler and others to refer their claims to commissioners of estimate and assessment under Laws 1895, c. 1006, the commissioners appealed, and the order was reversed (67 N. Y. Supp. 603, 56 App. Div. 122), and an appeal granted.

John Whalen, Corp. Counsel (Theodore Connoly, John P. Dunnand, and Thomas C. Blake, of counsel), for appellants.

Joseph A. Flannery, for respondents.

Bartlett, J. This appeal is taken by permission of the appellate division. Two questions are certified. The petitioners are the owners of certain premises on the easterly side of Monroe avenue, between 181st and 182d streets, in the city of New York. The claim of the petitioners is that Monroe avenue, between 181st street and a point north of their premises, has been discontinued and closed by the city, and a new street, known as "Morris Avenue," has been laid out a short distance west thereof. The title to Morris avenue, as newly laid out, vested in the city of New York on November 29, 1897. On the 9th day of June, 1899, the respondents presented to the comptroller of the city of New York a claim in writing for damages sustained by reason of the closing and discontinuance of Monroe avenue pursuant to the provisions of chapter 1006 of the Laws of 1895. Thereafter, and on the 28th day of July, 1899, the petitioners served a notice of motion for an order directing the commissioners of estimate to ascertain the compensation which should be made to them for their damages in the premises, and providing that an award for said loss and damages be fixed by the commissioners, and included in their report, pursuant to the provisions of section 14 of the act of 1895. This motion was opposed by the city of New York upon the ground that Monroe avenue had not been closed and discontinued within the meaning of the act of 1895. The special term denied the petitioners' motion,

and on appeal the appellate division reversed the order, and granted the motion of petitioners. Thereafter the city moved for leave to appeal to this court, which was granted, and stated that the following questions have arisen in this proceeding, which are certified to the court of appeals for review and determination, as follows: (1) Did the making and filing of the maps of section 14 of the final maps of the Twenty-Third and Twenty-Fourth wards by the local authorities of the city of New York on December 17, 1895, operate to discontinue and close Morris avenue (fomerly known as "Monroe Avenue," or "Avenue A") in front of the petitioners' premises under and in pursuance of chapter 1006 of the Laws of 1895? (2) Was the said Morris avenue in front of the petitioners' premises not shown on said final map of section 14 of the Twenty-Third and Twenty-Fourth wards, so that the same ceases to be and remain a street and avenue within the provisions of said chapter 1006 of the Laws of 1895?

This proceeding involves a somewhat complicated question under a number of statutes, but the points raised are quite simple when the legislation bearing on the subject is chronologically considered. This legislation refers to the Twentv-Third and Twenty-Fourth wards in the city of New York, which is a district lying north of the Harlem river, and when consolidated with the city of New York was composed of a number of small villages, such as Morrisania, Fordham, West Farms, etc., and the street system then existing was mainlv the result of dedication by the filing of maps by private citizens having farm lands to divide up and sell. After the annexation the increase of population was very rapid, and the necessity for a uniform street system became pressing. Chapter 545 of the Laws of 1890 was an act providing for the election of a commissioner of street improvements in these two wards, and transferred to him certain powers that were then possessed by the department of public parks of the city. This commissioner was granted the exclusive power to locate and lay out, construct and maintain, all streets, roads, avenues, and public squares and places, and to devise plans for and locate all bridges and tunnels, and also sewers and drainage facilities; fixing the grades and widths of streets and avenues. The commissioner was required, within two years and six months from January 1, 1891, to complete surveys, maps, plans, and profiles of all streets, roads, avenues, public squares, and places located and laid out, or hereafter to be located and laid out, in said territory, showing location, widths, grades, etc. The time in which to file maps was extended so as to include the period involved in this litigation. The act further provided that when the maps, plans, and profiles were so filed they were not to be subject to any further change or modification, but should be final and conclusive as to the city and all persons whomsoever. Under this authority the commissioner proceeded to divide the district into 28 sections,

and to make and file plans and profiles thereof, most of which were filed after June 12, 1895, which was the date when chapter 1006 of the Laws of 1895 took effect. The act of 1895 is entitled "An act to provide for discontinuing and closing streets, avenues, roads, highways, alleys, lanes and thoroughfares in cities of more than one million two hundred and fifty thousand inhabitants," and provides for the closing of streets in New York City, the consequent readjustment of the land titles caused thereby, and an estimate of damages incidental thereto. This act has been before us in a proceeding wherein its constitutionality was challenged. In the case of In re Mayor, etc., of City of New York, 157 N. Y. 409, 52 N. E. 1126, we held that its provisions were within the constitutional powers of the legislature, and Judge Haight, writing for the court, said: "It is doubtless true that some of the provisions of the act pertaining to the acquiring of the fee and easements in discontinued streets, if they stood alone, might be construed as authorizing the taking of property for a private use; but, when these provisions are considered in connection with the other provisions of the act, we find that they all aim at one object, and that is the laying out and opening of the streets and avenues of a city according to a plan adopted. Confessedly, this is for a public purpose, and we think that the acquiring of the fee and easements in the old roadways which are discontinued should be treated as incident and necessary to carry out the public improvement authorized by the provisions of the act." The opinion of the court was brief, and adopted the opinion of Mr. Justice Patterson in the court below. 28 App. Div. 143, 52 N. Y. Supp. 588. For the purposes of this case it is unnecessary to examine in detail the lengthy provisions of the act of 1895, which were fully considered by Mr. Justice Patterson. The second and fourteenth sections of this act are especially involved at the present time.

The act of 1890 provided no scheme for the closing of old streets, but was a legislative plan to lay out a system of streets in the city of New York in the two great wards lying north of the Harlem river. The legislation of 1895 was evidently designed to supplement the law of 1890, and both of these acts must be read together in order to understand the general scheme for the laying out and opening of new streets and discontinuing the old streets that interfered with the consummation of that plan. More than 800 streets and sections of streets were shown on these maps as finally filed to be discontinued and closed. There can be no doubt, as stated by the corporation counsel at our bar, that this case presents questions of the greatest importance, and involves a vast sum of money, in which the city and private citizens alike are deeply interested. Section 2 of the act of 1895 provides, in substance, that the local authorities authorized to lay out streets shall, upon any map or plan so made and filed, designate only the streets, avenues, *and roads* to be laid out. This section also provides

that after the filing of such a map the streets, avenues, and roads shown thereon shall be the only lawful ones, provided the discontinued streets are not then actually in use. If actually in use, it is provided that, if they are included within a square or plot of ground made by the intersection of streets upon the map or plan, they shall continue to be used until any one of the streets, avenues, or roads bounding such plot shall be opened by the city. This section also enacts that its provisions shall apply to maps and plans heretofore made and filed. The proceeding now before the court, in which the petitioners have intervened, was instituted by the city to gain possession of the title to Morris avenue as newly laid out, and thereupon the petitioners became entitled under the foregoing provisions of section 14 of the act of 1895 to apply to the court for an order directing the commissioners to ascertain their damages, and duly make an award for the same. Section 14 provides, in substance, that, as often as the local authorities shall institute proceedings to open a street shown upon the general map or plan, which shall be contiguous to or in the neighborhood of any parcel of ground fronting on a discontinued street, the court shall appoint commissioners of estimate and assessment to ascertain damages and make an award.

There is one other act of the legislature having a direct bearing upon this proceeding. Chapter 712 of the Laws of 1896 is entitled "An act in relation to the final maps, plans, and profiles of the Twenty-Third and Twenty-Fourth wards of the city of New York." Section 1 reads as follows: "Sections one to twenty-eight, inclusive, of the final maps and profiles of the Twenty-Third and Twenty-Fourth wards of the city of New York, adopted and established by the commissioner of street improvements of the Twenty-Third and Twenty-Fourth wards, as changed, modified and altered by the board of street opening and improvement of the city of New York, which changes, modifications and alterations are hereby authorized, ratified and confirmed, filed in the various offices designated by law on or before January first, eighteen hundred and ninety-six, shall constitute the final maps and profiles of the street system of said wards, according to which said streets, avenues, roads, public squares, parks and places, and the grand boulevard and concourse shall be acquired, opened and improved, and every provision of law in relation to the laying out and establishment of said streets, avenues, roads, public squares, parks and places, and of the grand boulevard and concourse, and in relation to the making and filing of the final maps and profiles thereof, shall hereafter be deemed to have been complied with." This legislation was designed to cure the irregularities which had occurred from the inception of this scheme under the act of 1890 and the later act of 1895, relating to the making and filing of the maps and profiles as provided by law. The position of the city is that under the

acts of 1890 and 1895 two methods of closing streets in the city of New York were provided by the legislature, of either one of which it could avail itself. This contention is clearly unsound. The act of 1890 contained no scheme for the closing of streets in the Twenty-Third and Twenty-Fourth wards. It is an act providing for the laying out of streets in this extensive territory, which renders necessary the discontinuance of old streets that might interfere with the execution of the new plan. The act of 1895 obviously supplemented the act of 1890 by providing a detailed scheme for discontinuing and closing streets. The city assumes the additional position that even under the act of 1895 it performed no act that would close the streets, as matter of law, that are proposed to be discontinued: in other words, that the act of 1895 is not self-executing. There are two answers to this position. Assuming that the acts of 1890 and 1895 must be read together, the filing of the maps and plans by the very terms of the later act is, as matter of law, a discontinuance of the old streets omitted from the maps so filed. The only limitation placed upon the property owner is that he cannot move to have his damages assessed as to a street in use until the city actually institutes proceedings to acquire the title to at least one street in the plot or square, including the premises alleged to have been damaged. The petitioners have brought the proceeding within this provision, and the filing of section 14 of these maps after the act of 1895 took effect, although prepared to some extent before that date, was an affirmative act on the part of the city that resulted in rendering the streets proposed to be laid out and the streets to be discontinued, in the language of section 2 of the act of 1895, "final and conclusive."

The city makes the further point, which seems to have been given great weight by the special term, that the discontinued and closed streets were not omitted from the maps filed, as required by section 2 of the act of 1895. While there was not a literal compliance with the statute in this regard, there has been a substantial compliance. The newly laid out streets were shown in one color, and the discontinued streets in another. The literal reading of the statute undoubtedly required that the discontinued streets should not appear upon these maps, but as they were ultimately filed they show to the eye at a glance those streets that are new and those that are discontinued. It would be a narrow and unreasonable construction to hold that the decision of the case should turn on this slight error of the engineer having in charge the preparation of the maps. Furthermore, the act of 1896 (chapter 712) was clearly intended to cure such irregularities. If the argument of the learned corporation counsel is sound that, notwithstanding the filing of these maps, no street can be declared closed and discontinued until it is actually and physically closed, the result would be a great hardship to property owners. After the city had filed a map which showed

the street to be closed and discontinued, it would naturally prevent the owner from making improvements upon his property, and would render it for the time being unsalable. It cannot fairly be assumed that the legislature contemplated placing the citizen in any such plight. The city is sufficiently protected by the provision which prevents the owner of property, as to street in use, from asking that the damages to his private easements of light, air, and access should be ascertained, until the city seeks to open a new street on the plot of ground where the premises involved are located.

Attention has already been called to the fact that the act of 1895 took effect June 12, 1895, and that section 14 of these maps, which includes the premises in question, was not filed until December 17, 1895. The first question, already quoted, is, in substance, whether the filing of the maps by the city after the act of 1895 took effect operated to discontinue Morris avenue in front of the premises in question. This question is answered in the affirmative.

The second question relates to the failure to physically omit from the map filed the discontinued streets. That question asks, in substance, whether Morris avenue in front of the petitioners' premises was omitted from the final map of section 14. In view of the suggestion already made that there was a substantial compliance with the statute in that regard, this question should be answered, as matter of law, in the affirmative.

The order appealed from should be affirmed, with costs.

Parker, C. J., and O'Brien, Haight, Martin, Vann, and Landon, JJ., concur.

Order affirmed.

MUHLENBERG

v.

CITY OF TACOMA *et al.* (BALKWILL, Intervener).

(*Supreme Court of Washington, April 24, 1901.*)

[64 Pac. Rep. 925.]

Pledges — Foreclosure — Intervention. — Where city warrants are pledged by the owner as security for an indebtedness, and a trustee of the pledgee sues the city to recover thereon, claiming that the pledgee is owner under a sale to itself pursuant to the contract of pledge, the receiver of the insolvent pledgor, claiming the sale was fraudulent and collusive, may intervene in the action to protect the interests of the estate represented by him, though he may have another remedy, since 2 Ballinger's Ann. Codes & St. § 4846, authorizes any person to intervene in an action who has an interest in the subject in litigation.

Muhlenberg *v.* City of Tacoma

Same—Same—Same—Power of Court.—Where a pledgee of city warrants, claiming to have acquired absolute ownership, sues the city to recover thereon, and the receiver of the insolvent pledgor intervenes, claiming the warrants and proceeds thereof, subject to plaintiff's rights as pledgee, the court may fully determine the respective rights and interest of all the parties in the action.

Same—Same—Same.—Where a pledgee of city warrants, claiming to have acquired full title by a sale to itself on foreclosure of the pledge, sues the city to recover thereon, the receiver of the insolvent pledgor, claiming the foreclosure sale to be void, may intervene, and have their respective rights to the warrants determined, without first tendering payment of the debt.

Same—Same—Same—Laches.—City warrants were pledged to secure a debt of half their face value, and the pledgor soon after failed, having no estate except the warrants. The city, claiming the warrants were invalid, refused payment, and suits brought by other parties to determine their validity were pending. The pledgee notified the pledgor's receiver that it would sell the warrants to apply on the debt, and the receiver answered by telegram that he hoped there would be no trouble, and hoped soon to pay the debt. The pledgee sold the warrants at auction to itself for about one-sixth their face value. Thereafter the receiver and his attorney participated in litigation to determine the validity of the warrants, and advised the pledgee of the progress thereof from time to time, and always referred to the warrants as still in pledge. The pledgee did not assert ownership until after the validity was fully determined, but, on the contrary, its president, long after the sale, stated that they would be satisfied if the debt was paid. *Held* that the receiver was not guilty of laches in not suing to set aside the sale until he intervened in the suit brought by the trustee of the pledgee against the city to recover on the warrants.

Same—Same—Same—Title.—Where the pledgee of city warrants sold them at public sale to itself for a small fraction of their face value, at a time when the warrants had no market value because their validity was disputed by the city, and when the receiver of the insolvent pledgor had no money to pay the debt, the sale being solely to secure title to the warrants, so that the pledgee could handle them more conveniently, and not for the purpose of paying the debt, such sale conveyed no title, and the receiver was entitled to redeem the warrants by payment of the debt and proper expenses incurred by the pledgee.

Appeal from superior court, Pierce county; Thomas Carroll, Judge.

Action by Francis B. Muhlenberg against the city of Tacoma and its treasurer, defendants, and S. R. Balkwill, intervener. From a judgment in favor of intervener, plaintiff appeals. Affirmed.

John A. Shackleford, for appellant.

John D. Fletcher, for respondent.

White, J. The original action in which this intervention

Case Stated.

was filed was begun May 27, 1898, by Francis B. Muhlenberg against the city of Tacoma and its treasurer. A large number of warrants were assigned to Muhlenburg for the purpose of enabling him to bring the action. In his complaint he asked that the warrants held by him be declared to be valid obligations of the city of Tacoma, and that the city and its treasurer be enjoined from using the revenues of the city arising from taxes, licenses, and fines for payment of debts of the city contracted since the issuance of the warrants held by him. The defendants answered that the warrants held by the plaintiff had been paid, and that they were void. On June 15, 1898, S. R. Balkwill, receiver of the German-American Safe-Deposit & Savings Bank, procured leave, and filed a complaint in intervention. This intervening complaint alleged that on October 31, 1895, the German-American Safe-Deposit & Savings Bank was the owner of about $30,000 of Tacoma city warrants, and that it then pledged said warrants to the Independence National Bank of Philadelphia as security for an indebtedness of $18,000; that the Independence National Bank filed a creditor's claim with the intervener, as receiver, for $18,229.46, which claim was allowed; that the Independence National Bank claimed to be the owner of the warrants, and refused to recognize any interest of the intervener in them; and that the Independence National Bank had assigned the warrants to the plaintiff for the sole purpose of maintaining this action. The prayer was that the intervener might be declared the owner of the warrants, and subrogated to all the rights of the plaintiff in the action; and the remainder of the prayer was the same as the one contained in the plaintiff's complaint. On October 26, 1899, the intervener filed an amended intervening complaint. The first paragraph of the amended intervening complaint sets forth the appointment of the intervener as receiver of the German-American Safe-Deposit & Savings Bank. The second paragraph alleges leave to intervene in this cause and leave to amend the complaint in intervention. The third paragraph alleges that the Independence National Bank is a corporation. The remaining paragraphs are as follows: That on or about the 25th day of April, A. D. 1894, said German-American Safe-Deposit & Savings Bank borrowed of said Independence National Bank of Philadelphia the sum of $25,000, and to secure payment of said sum deposited city warrants of the city of Tacoma, Pierce county, Wash., of the face value of about $30,000. That payments were made upon said loan from time to time by said German-American Safe-Deposit & Savings Bank, so that the amount still remaining unpaid on said loan at the time the receiver was appointed over said German-American Safe-Deposit & Savings Bank was the sum of $18,000. At the time the receiver was appointed as aforesaid the city of Tacoma was denying and disputing the validity of a large number of outstanding city warrants, and, among

others, the said warrants so held by said Independence National Bank of Philadelphia as collateral, and was refusing to pay any of said warrants, on the ground that the same had once been paid, and were invalid. That immediately thereafter the said Independence National Bank requested, instigated, and induced the intervener to go to great trouble and expense to procure an adjudication in the courts that the warrants aforesaid, so held as collateral by said Independence National Bank, were valid, and had not been paid. And the intervener, by reason of the instigation and inducement on the part of said Independence National Bank, and for the purpose of protecting the interest of his trust in said warrants, did go to great trouble and expense, and did, by himself and his employees, spend several months of time and more than $500 in money in procuring information, and preparing evidence, and otherwise assisting the holders of said Tacoma city warrants in preparing their causes for trial; three of which causes were litigated through the supreme court of the state of Washington before the validity of the said warrants so held as collateral was finally determined and adjudicated in favor of the warrant holders. And the said Independence National Bank never informed or notified the intervener that it made any claim to be the absolute owner of said warrants, or that the intervener's interest and equity therein had terminated, until after the intervener had incurred said expense and spent said time and labor in establishing the validity of said warrants; and the intervener was, during the progress of the litigation, and at all times until after the principal cause involving the validity of said warrants had been decided sustaining the validity of said warrants, permitted, allowed, and induced by said Independence National Bank of Philadelphia to believe, and did believe, that the trust which he represented had an equity and interest in, and was the owner of, said warrants, subject only to the payment of said indebtedness for which the same had been pledged; that by reason of the foregoing the said Independence National Bank and the said plaintiff, as its representative, are now estopped, and ought not to be heard to claim that the intervener is not the owner of said warrants so pledged as collateral as aforesaid. The intervener further alleges: That the said Independence National Bank, on or about the 10th day of December, 1895, filed its claim with the intervener against said German-American Safe-Deposit & Savings Bank for the amount still unpaid upon said loan, with interest, making the total amount of said claim $18,229.46; and that the intervener, as receiver, approved and allowed said claim. That at the time intervener was appointed receiver, said German-American Safe-Deposit & Savings Bank had no money whatsoever, and property of very little value, and that from the assets of said German-American Safe-Deposit & Savings Bank, other than the warrants held by said Independence National Bank of Philadelphia as

collateral as aforesaid, it was impossible to realize more than the sum of $1,000, which fact was at that time made known to said Independence National Bank of Philadelphia. That afterwards, to wit, on or about the 9th day of September, 1899, the intervener made and fully completed arrangements by which he could obtain money to pay off the amount remaining unpaid on said loan of said Independence National Bank of Philadelphia, and at once notified said Independence National Bank that he was ready and willing to pay said amount, and did then tender to it the full amount remaining unpaid upon its loan, principal and interest, and requested said Independence National Bank, upon such payment being made, to turn over to said receiver said warrants held by it as collateral as aforesaid. That thereupon said Independence National Bank refused, and ever since has refused, to accept such payment or to turn over the warrants, or any of them, held by it as collateral as aforesaid; and then made a claim, and still makes the claim, that the intervener has no interest, equity, right, or claim in or to said warrants, or any part of them, but that it, the said Independence National Bank, has become the absolute owner of said warrants under and by virtue of some pretended sale of said warrants made in the city of Philadelphia on or about the 23d day of April, 1896, at which said pretended sale the said Independence National Bank claims to have become the purchaser of all of said warrants, and by reason thereof to be now the absolute owner and holder of the same free and clear of any equity, interest, right, or claim of the said German-American Safe-Deposit & Savings Bank or the intervener. The intervener further alleges: That notice of said sale was not given to him prior to the time the same is claimed to have been made, and he had no prior notice thereof, to enable him to protect the interests of his said trust; and at no time subsequent to said pretended sale has the intervener been notified or informed that any such sale had been made, or what amount, if any, was realized as the proceeds of said sale; and the said Independence National Bank has never receipted to the intervener for the proceeds of said sale, has never given him any credit therefor upon the claim so filed with the intervener, and has never withdrawn, or in any manner changed or modified, said claim for $18,229.46. That at the time said Independence National Bank claims to have made said sale of said warrants it and its officers well knew that the intervener had no money in his said trust with which to pay off the amount of said loan, and well knew that the validity of said warrants was disputed by the city of Tacoma; that actions were pending to test their validity and enforce the payment of said disputed warrants of the city of Tacoma, including those held by it as collateral as aforesaid; and that, if the validity of said warrants should be established, the amount still unpaid upon its loan would be at once paid; that, if said warrants were held invalid, they would have no

value whatsoever, and that no sale thereof could be made at any fair or reasonable price during the pendency of said litigation. And the said Independence National Bank in making said pretended sale, if any was made, did not act in good faith for the purpose of realizing money as the proceeds of such sale to apply upon the said debt from the intervener's trust to said bank, but, on the contrary, acted fraudulently, and with the design and intent to injure the intervener's said trust and the creditors of the German-American Safe-Deposit & Savings Bank, by making a pretended and collusive sale of said warrants to itself, or to its own officers, for the mere purpose of cutting off the rights, equities, and claims of the intervener therein, and thereby hinder, delay, and defraud the creditors of the intervener's said trust. That said plaintiff Francis B. Muhlenberg has no interest whatsoever in said warrants, but is merely a nominal party representing said Independence National Bank of Philadelphia. That it is impossible for the intervener to give an accurate and exact list of said warrants, but all of the same are included in this action, and are the property of and belong to the intervener. That the intervener is now able, ready, and willing to pay and does tender to the said Independence National Bank of Philadelphia, and to plaintiff herein, as its representative, the full amount, principal and interest, still unpaid upon said loan, together with any and all legitimate expenses that they, or either of them, have been put to in protecting or caring for said collateral, upon proof of the same being submitted to this court in this cause. The intervener prayed for a decree adjudging the sale of the warrants held as collateral to be fraudulent, collusive, and void, and that the intervener be adjudged to be the owner of the warrants in controversy, subject to the payment of the indebtedness for which the same had been pledged, together with all legitimate expenses of the pledgee, and that the Independence National Bank and the plaintiff be required to deliver the warrants to the intervener upon the payment of said indebtedness, together with the expenses; and that the intervener be subrogated to all the rights of the plaintiff as to said warrants. The remainder of the prayer is in accordance with the prayer contained in plaintiff's complaint, and asks that the warrants be declared to be valid, and that the defendants be enjoined from using the moneys of the city to pay indebtedness accruing since the issuance of the warrants until the warrants shall have been fully paid. A demurrer to this amended complaint in intervention was filed on November 11, 1899. The grounds stated were that the court had no jurisdiction of the person of the plaintiff; that the court had no jurisdiction of the subject-matter of the action; that the intervener had no legal capacity to sue; that there was a defect of parties plaintiff; that there was a defect of parties defendant; that several causes of action had been improperly united; that the complaint did not state facts sufficient to constitute a cause of action; that the action

had not been commenced within the time limited by law; and that the complaint did not state facts sufficient to entitle the receiver to intervene in the cause. On the same day the demurrer was heard, and an order entered overruling it. The answer of the plaintiff to the amended intervening complaint was filed on the 6th day of December, 1899. It denied a number of allegations contained in the intervening complaint, and by way of affirmative defense alleged that on the 23d day of April, 1896, the Independence National Bank caused the warrants in dispute, which it held as collateral, to be sold at public sale, and that the warrants were bought in for the Independence National Bank for the sum of $5,000, which amount was credited upon the indebtedness of the pledgor; and the answer sets forth the written agreement of pledge in which the German-American Safe-Deposit & Savings Bank waived any notice of sale, and consented that the pledgee might become a purchaser at the sale of the pledged property. The answer further alleged laches on the part of the receiver in attacking the sale of the collateral, and that he had waited until the collateral had risen greatly in value before taking any steps to set aside the sale of the collateral. The answer also alleges the solvency of the Independence National Bank. The reply denies a portion of the allegations of the answer, and restates some of the allegations of the amended complaint in intervention.

The evidence was, in substance, as follows: About April 25, 1894, the German-American Safe-Deposit & Savings Bank borrowed of the Independence National Bank of Philadelphia $25,000, and to secure the payment thereof deposited city warrants of the city of Tacoma of the face value of about $30,000. On June 8, 1895, the amount of the debt had been reduced to $18,000, and on that day the German-American Safe-Deposit & Savings Bank executed and delivered to the Independence National Bank a certificate of deposit for the sum of $18,000 as a token of said indebtedness. This certificate was payable on demand. This certificate bore interest at 6 per cent. Upon the 8th day of August, 1895, the German-American Safe-Deposit & Savings Bank delivered the following agreement to the Independence National Bank, to wit: "We herewith deposit with the Independence National Bank of Philadelphia, as collateral on our certificate of deposit No. 181, dated June 8th, 1895, for $18,000, on demand, $24,583.05, warrants of the city of Tacoma, Washington, which we hereby pledge, together with any that may be pledged hereafter, to secure this or any future obligations. Upon default of payment of said or any other certificate of deposit, we hereby authorize and empower the Independence National Bank of Philadelphia, for the purpose of liquidation of this certificate of deposit, and of all interests or costs thereon, to sell, transfer, and deliver the whole or any part of such security, or any additions thereto, or substitute therefor, without any

previous demand, advertisement, or notice, either at brokers' board or public or private sale, at any time or times thereafter, with the right on the part of such holder to become the purchaser and absolute owner thereof, free of all trusts and claims. German-American Safe-Deposit & Savings Bank, by A. J. Weisbach, Sec'y. Tacoma, Wash., August 8th, 1895." By mistake the amount of warrants is recited in the agreement to be $24,583.05 face value. The correct amount of warrants then held by the Independence National Bank and covered by the agreement was $27,454.80. These warrants were all issued in 1894. Interest upon the certificate was paid to the 31st day of October, 1895. On November 6, 1895, S. R. Balkwill was appointed receiver of the German-American Safe-Deposit & Savings Bank, and qualified as such. On November 20, 1895, the cashier of the Independence National Bank wrote to the receiver, saying: "We beg to notify you that we wish payment made of a certificate of deposit we hold to the amount of eighteen thousand ($18,000) dollars, of the German-American Safe-Deposit & Savings Bank, secured by $27,454.48 of Tacoma warrants. Unless this amount is paid, we beg to notify you that we will proceed to sell such collateral for the account above named." On November 29th the receiver wrote a letter, saying, among other things: "In answer to yours of the 20th, beg to say it is impossible to take up certificate of deposit, as we have no funds. All the cash we found on taking possession of the bank was one dollar and ten cents ($1.10), and the fixtures there were of little or no value." On December 10, 1895, the Independence National Bank sent to the receiver a statement of its claim against him. On January 30, 1896, in response to a telegram inquiring whether the receiver was making efforts to secure payment of the warrants, he answered: "Have employed eminent counsel. Must have your assistance. Estate has no funds." On February 3, 1896, the receiver sent a letter, stating, among other things, that all the assets of the German-American Safe-Deposit & Savings Bank were not actually worth over $1,000, and that claims had been filed against it to the amount of over $90,000, and suggesting that the Independence National Bank join in a plan to employ and pay the receiver's attorney to bring suit on the warrants. On February 13th the Independence National Bank wrote, inquiring who the other parties were who would be interested in this suit, what the receiver proposed to do, and what the probable expense would be. To these questions the receiver made no response. On April 2d the receiver wrote, asking the Independence National Bank to send $132 to be paid to his attorney as fees, and on April 9th the Independence National Bank answered this letter, declining to employ the receiver's attorney. At all times from the 20th day of June, 1895, until July 1, 1899, the city of Tacoma claimed that these warrants were invalid, and the city was contesting its liability

on its general fund warrants in the courts. The answer of the city treasurer in the Jordan case was filed on June 25, 1895, and on July 21, 1895, Judge Stallcup, of the superior court, had delivered an opinion in that case, holding all of the outstanding city warrants, except about $23,000, issued in 1892, to be invalid. No interest had been paid on the loan since October 31, 1895. On April 14, 1896, the president of the Independence National Bank sent the following letter to the receiver: "Philadelphia, April 14, 1896. S. R. Balkwill, Esq., Receiver German-American Safe-Deposit & Savings Bank, Tacoma, Washington—Dear Sir: We beg to notify you that the warrants which we hold as security for the payment of certificate of deposit issued by the German-American Safe-Deposit & Savings Bank, No. 181, for $18,000, dated June 8th, 1895, will be sold at public sale in this city on Thursday, the 23d instant. Yours, truly, [Signed] R. L. Austin, Pt." This letter was received by the receiver about April 21, 1896, and he sent the following telegram: "To the Independence National Bank, Philadelphia, Pennsylvania: Trust we will have no trouble with you over the warrants, as we hope to pay you in full shortly. S. R. Balkwill, Receiver." The warrants were delivered to M. Thomas & Sons, auctioneers, to sell. The sale was advertised in a catalogue of real estate and stocks to be exposed for sale at the Philadelphia Exchange on Thursday, April 23, 1896, at 12 o'clock noon. The item of these warrants is the first one in the list contained in the catalogue. Fifteen hundred of these catalogues were circulated among the banks, trust companies, insurance companies, bankers, brokers, and capitalists of the city of Philadelphia previous to the sale. The sale of the warrants was also advertised in the Philadelphia Ledger, a newspaper of general circulation in Philadelphia, in the issues of April 21, 22, and 23, 1896. The warrants were sold in accordance with the advertisement on the 23d day of April, 1896, at the Philadelphia Exchange, for the sum of $5,000, on a bid made by George S. Crapt, a broker acting in behalf of the Independence National Bank, and his bid was the only bid made at the sale. There were at least 50 persons present at the sale. The sale was made, in regard to place, time, manner, and notice, in the way that is customary in Philadelphia. On December 21, 1896, in the suit brought by Murry, a taxpayer, against the city and its officials, the superior court entered a decree holding all of the outstanding warrants of the city to be invalid. The Independence National Bank joined other warrant holders in paying the expenses of the test suit of Eidemiller against Tacoma. The Independence National Bank also joined other warrant holders in paying the expenses in the case of Bardsley against Sternberg,—a suit brought to test the validity of warrants similar to those involved here. The superior court, on April 7, 1897, entered a decree in the Bardsley case holding the warrants involved

to be invalid, and on June 25, 1897, this court rendered an opinion sustaining that decree. Afterwards, on rehearing, an opinion was rendered on February 18, 1898, reversing the lower court. The city still continued to contest its liability on its warrants, and the warrants in controversy here, together with many others belonging to other holders, were assigned to Francis B. Muhlenberg for collection. The Independence National Bank joined with others in paying the expenses of this Muhlenberg suit. The Independence National Bank has spent $8,745.48 in carrying on litigation on these warrants. Each of the holders who joined in the payment of the expenses of the Eidemiller, Bardsley, and Muhlenberg cases paid a sum equal to 10 per cent. of the face value of the warrants held by them. Muhlenberg is a clerk in the Independence National Bank. The court below concluded as a matter of law that the Independence National Bank of Philadelphia held said warrants under its original pledge, and that Balkwill, as receiver of the German-American Safe-Deposit & Savings Bank, was the legal owner of the same, and had the right to the possession of the same upon paying to said Independence National Bank of Philadelphia, or by depositing with the clerk of the court for said Independence National Bank of Philadelphia, its original debt of $18,000 and 6 per cent. interest from the 31st day of October, A. D. 1895, until paid, and the sum of $2,745.48, expended by the Independence National Bank of Philadelphia in protecting the warrants and proving the validity of the same, less the costs and disbursements expended by intervener in the intervening proceeding; and that intervener was entitled to be subrogated to the rights of plaintiff in the decree heretofore entered in this cause in favor of plaintiff and against the city of Tacoma and its treasurer, so far as said warrants are concerned.

It is claimed that the respondent did not have the right to intervene. The warrants which were the subject-matter in litigation between the respondent and the city of Tacoma were pledged to the Independence National Bank of Philadelphia, for whom the respondent was acting as trustee in prosecuting the suit against the city. While the property was transferred as a pledge to the Independence National Bank, the legal title remained in the German-American Safe-Deposit & Savings Bank, for which the respondent was receiver. Jones, Pledges, §§ 7–9. The respondent claimed, in his complaint of intervention, that the alleged sale under which the Independence National Bank of Philadelphia claimed title was not made in good faith, but was fraudulent and collusive, and for the purpose only of vesting title in the Independence National Bank, and cutting off the claims, rights, and equities of the respondent therein. If such was the case, the general property in the warrants never passed from the respondent or the German-American Safe-Deposit & Savings Bank to the

Pledges—Foreclosure—Intervention.

Independence National Bank, and the appellant would, in law, be a trustee for both the Independence National Bank and the respondent. The receiver was equally interested with the Independence National Bank in seeing that the validity of these warrants was established, and was likewise interested in any judgment recovered against the city of Tacoma on the establishment of this validity. The appellant, however, claimed that the respondent had no title or interest in the warrants or in the judgment that might be recovered thereon, and he assumed to act only for the Independence National Bank, and adverse to the respondent. In suits in equity brought by a trustee or otherwise affecting trust property, the beneficiary of the trust may intervene for the purpose of protecting his interest, and particularly so when the trustee shows a disposition to act adversely to his interest. Fidelity Trust & Safety-Vault Co. v. Mobile St. R. Co. (C. C.) 53 Fed. 851; 11 Enc. Pl. & Prac. p. 500. Our statute relevant to intervention is that: "Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either party, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant. * * *" 2 Ballinger's Ann. Codes & St. § 4846. The plaintiff had a direct interest in the matter in litigation. He was interested in seeing that the validity of the warrants was established, and that a decree was entered against the city of Tacoma requiring payment. He was interested in the success of the plaintiff in obtaining this judgment. In the distribution of the proceeds of the judgment his interest was adverse to both the plaintiff and the defendant. The section quoted does not attempt to specify what or how great the interest of the intervener shall be in order to give a right to intervene. Any interest is sufficient. "The fact that the intervener may or may not protect that interest in some other way is not material. If he has an 'interest in the matter in litigation, or in the success of either of the parties,' he has a right to intervene." Coffey v. Greenfield, 55 Cal. 382. After he has intervened, it is the duty of the court to dispose of the whole matter in controversy between the original plaintiff and defendant and the intervener so that the interest of the intervener shall be completely protected. If this was not to follow, the right to intervene would be a barren one. Hence we conclude that the respondent had a right to intervene in this action, and, if the allegations of his complaint of intervention are true, the judgment of the court must be upheld.

Same—Same—Same—Power of Court.

Muhlenberg *v.* City of Tacoma

When the owner pledges property or choses in action for the payment of a debt, the creditor no doubt has the right to hold the pledge until the debt is paid, and the pledgor cannot recover back the pledged property until he tender, or pay, or offer to pay, the debt. This action is not primarily for the purpose of recovering back the pledged warrants. It is to determine whether the respondent is the owner of the warrants, and entitled to recover them back, upon paying the amount for which they were pledged to the Independence National Bank. "An unlawful sale does not per se operate as a conversion, yet the pledgor may, at his option, so consider it, and that he may regard the contract as at an end, tender or offer to pay his debt, and demand his pledge." Jones, Pledges, § 571. The respondent in this case offers to pay his debt, but the appellant in effect says, "I will not accept it; the warrants are mine." Under such circumstances, why go through the useless ceremony of tendering the debt for which the warrants were pledged, particularly so when the intervener only prays that he may be adjudged the owner of the warrants subject to the payment of the indebtedness, and prays that, when the indebtedness is paid, the trustee may be directed to deliver to him the warrants? The appellant was clothed by the Independence National Bank with apparent ownership of the warrants, and, claiming to be such owner, brought this action against the city of Tacoma to establish the validity of the warrants; and, while the Independence National Bank might have been a proper party to the action, it is not a necessary party. The appellant stands in the place of the Independence National Bank so far as his connection with these warrants is concerned, and he holds them subject to all the equities existing in favor of the intervener. The original action was commenced on May 17, 1898, and the order for leave to intervene was made on June 15, 1898. The complaint of intervention alleges that the Independence National Bank requested the respondent to procure an adjudication on the validity of the warrants, and that on the 10th of December, 1895, the Independence National Bank filed its claim with the respondent, as receiver of the German-American Safe-Deposit & Savings Bank, for the loan for which the warrants were pledged; and the further allegation is made that the intervener had no notice of the sale prior to the time it was made, that no assets came into his hands with which to redeem the warrants, and that this was known to the Independence National Bank; and it is further alleged that the Independence National Bank never informed or notified intervener that it made an absolute claim of ownership to the warrants, but by its conduct led the intervener to believe, and he did believe, that the German-American Safe-Deposit & Savings Bank had an equity in the warrants. There is nothing in the complaint of intervention showing laches on the

Same—Same—Same.

Same—Same—Same—Laches.

part of the intervener, and we have already held that the fact that he had another remedy was not material if his petition of intervention showed that he had an interest in the matter in litigation. We think the complaint of intervention stated a cause of action, and that the demurrer to the same was properly overruled. All questions involving the correct determination of this case center around the twenty-second finding of fact, which is as follows: "That said Independence National Bank of Philadelphia made said attempted sale of said warrants on April 23d, 1896, for the sole and only purpose of getting title to said warrants, and not for the purpose of paying said certificate of deposit, and not for the purpose of the liquidation of said certificate of deposit." The evidence, in our opinion, fully sustains this finding. The German-American Safe-Deposit & Savings Bank was a defunct institution, without assets sufficient to pay the cost and expenses of the receiver in winding up its affairs. It was absolutely beyond the power of the receiver to redeem these warrants, and he was without means to prosecute a suit to establish their validity. The respondent knew this; knew also that it must look alone to the city of Tacoma for the payment of the warrants. At the time the sale was made, the Independence National Bank knew that the warrants themselves were valueless, because the city of Tacoma was refusing to pay them, and was refusing to recognize them, with a large lot of other similar warrants, as its obligations, and was contending that the same had once been paid, and that they were nullities; and this contention of the city, according to the undisputed facts, was known to the Independence National Bank as early as June 20, 1895, and from that time until February 18, 1898, when this court, on a rehearing, changed its former views, and established the validity of similar warrants. Bardsley v. Sternberg, 18 Wash. 612, 52 Pac. 251, 524. These claims of the city as to the invalidity of the warrants, etc., were well known to the appellant at the time of the notice of the sale and at the time of the sale, and the least inquiry would have given the same information as the Independence National Bank possessed to any proposed investor or purchaser. We have a right, under such circumstances, to presume that the Independence National Bank considered the warrants valueless for all marketable purposes, and that offering them for sale was but a mere idle ceremony. We think it is clear that the only object of the sale was to vest the title of the property in the Independence National Bank, so that it might be able to handle it to the best advantage if any opportunity should occur to settle with the city of Tacoma. Mr. Austin, president of the bank, testified: "We sold them in following out a universal practice, when a debt which is not paid, to always sell the securities protecting it to get title to the property, so we may be in position to handle it to the best advantage." The object of the sale of a

Same—Same—Same—Title.

pledge contemplated by the law is to realize thereon in payment of the debt, and, if conducted fairly under the power given to the pledgee, it will not be set aside because the highest market price was not realized. We will now review the cases cited by the appellant. King v. Insurance Co., 58 Tex. 669, simply holds that the pledgee is not required to wait until the money market is better; that the parties must have contemplated when the pledge and debt were made that there would be risk of fluctuations in the money market. In Whitin v. Paul, 13 R. I. 40, it is held that the pledgee of a chose in action given as a collateral was bound to use reasonable and ordinary diligence in realizing its value, but he was not bound to exercise extraordinary care, and was not bound to watch the market for the most favorable opportunity to sell the pledge. This case is far from supporting the proposition that the pledgee can sell when there is no market, and when he knows the thing offered for sale by reason of unforeseen circumstances is like so much waste paper, and has lost all its market value, and that such circumstances could not have been in contemplation of the parties when the pledge was made. Under such conditions it was the duty of the pledgee to take action, or at least he should have requested the pledgor to take the necessary steps to establish the validity of the pledge. If the pledgor, on such request, should refuse to act, then a sale might be made, for the refusal of the pledgor to act would be equivalent to an abandonment of the property. In Bank v. Newcombe (Sup.) 37 N. Y. Supp. 271, the court simply held that the creditor had a right to collect when his claim became due, and that the debtor could not compel him to wait because it was inconvenient to pay, and a bad time to realize on his assets. The stock and bonds in that case had some market value, and the pledgee knew he could realize something on them at the sale. The presumptions are all the other way in the case at bar. In the case of Hewitt v. Steele (Mo. Sup.) 38 S. W. 82, the stock had a value, and was sold for its full market value, and the complaint was that it was possible to have obtained a greater price for the stock if it had been sold before. The gist of that action was the alleged negligence of the debtor in selling stock for less than its value. Union Bank v. Forsyth (La.) 23 South. 917, simply holds that a sale on a depreciated market is permissible. In that case there was a market rate, and the pledges were sold for such rate. In Newsome v. Davis, 133 Mass. 343, it was held that the defendant was bound to exercise reasonable care and diligence to obtain whatever the stocks were worth at the time of sale. These are the cases cited by the appellant to sustain the alleged sale. In all these cases there was a market value to the thing sold at the time of the sale, and the sale was for the purpose of liquidating the debt and actually realizing on the security. The power of sale must be exercised with a view to the interests of the pledgor as well as of

the pledgee. The unfairness and inequitableness of this case consisted in attempting a sale when the pledgee knew there was no market value for the pledge, knew that he had to look to the pledged property alone for payment, and knew that suits were pending to prove the pledged property of a value far in excess of the amount of the debt for which they were pledged. Under such circumstances we think it was the duty of the pledgee to refrain from a sale of the pledged security until it was determined whether they were valid obligations or not. The Independence National Bank knew that it must get its money only out of the city of Tacoma upon these warrants, and that nothing could be realized from the insolvent pledgor, and that a sale to itself would not add one dollar towards the payment of the debt. It would put the bank, however, in a position to receive almost twice its debt if, by such a sale, it could obtain title, and if the warrants, after litigation thereon, should prove to be valid obligations against the city. If the warrants were invalid, it would realize nothing; and this would be true whether it was the owner or not of the warrants, and whether there was a sale or not. There can be no pretense that there was any intention of realizing money by reason of this sale. The bank had no purchasers in sight, and, under the circumstances, could reasonably expect none. As was said by Judge Bellinger in Morris v. Railroad Co. (C. C.) 95 Fed. 13: "The real character of the transaction shows through all these circumlocutions. The German Savings & Loan Society was not seeking to realize upon its securities, but to effect a transfer of the title of the bonds held by it to Morris & Whitehead. * * * But whether the pledgee may buy at his own sale is not considered. It is enough to defeat the sale that it was contrived between the seller and the buyer in order to get the pledgor's title at a sacrifice of his interest, with that result. I am of the opinion that the purchasers of these bonds are only entitled to a decree for the amount of the debts for which the bonds were pledged, and interest and costs; and this conclusion is based upon the fact that the sale to Morris & Whitehead was prearranged between the parties, that it was contrived between them as a means of acquiring the property pledged, and that it is immaterial whether the German Savings & Loan Society have any interest in the sale or not. * * * If this is so, it is unconscionable that the mortgagors, or, what is the same thing, the other creditors, shall lose this excess by the expedient of this sale, while some $5,000 of the original debt remains unsatisfied in the hands of the purchasers at the sale. If it shall turn out that the price bid is substantially all that the bonds are worth, then the considerations upon which this decree is based will fail. * * * In that case the purchasers at the sale will not be prejudiced by the decree. In any event, they will have their debt and interest, whether that is sufficient to absorb the property or not, and it is all they are equitably entitled to have." In the case at bar, under the

circumstances at the time of the sale, there certainly would be no purchaser for these warrants. The bank made a single bid of $5,000. When the validity of the warrants was finally established by this court, the warrants ceased to be waste paper, and their par value was at once re-established. The warrants now are worth about $41,000, or some $15,000 more than the claim of the Independence National Bank with interest and expense added. The Independence National Bank not only claims on a debt which originally amounted to $18,000 securities from which it can at any time collect $41,000, but, in addition to this, it also claims an indebtedness against the intervener for some $13,000, the difference between the amount of its bid and its debt, while other creditors of the German-American Safe-Deposit & Savings Bank will realize nothing upon their claims. The Independence National Bank is in no way injured by holding this sale invalid, for it will receive, in any event, its entire debt, interest, and expenses, and this is all it is equitably entitled to. Under the circumstances of this case there appears to be no over-powering equity preponderating in favor of the appellant that would justify this court in placing the ownership of these warrants in his hands to the injury of the other creditors of the insolvent German-American Safe-Deposit & Savings Bank. We think, also, that the facts fail to disclose any laches on the part of the intervener in asserting title to these warrants. The evidence shows that the Independence National Bank, shortly after intervener's appointment as receiver, made a demand upon the intervener for payment of its debt against his estate, and threatened, in case of default, to sell the warrants. Intervener thereupon wrote the Independence National Bank that he was the receiver of the bank without funds, that the Independence National Bank could not realize its debt except out of the warrants held by it as collateral, that the city was refusing payment of these warrants, and that their validity must be established before a purchaser could be found for the same. The Independence National Bank apparently acquiesced in said statement of affairs, and thereafter, on December 10, 1895, filed with the intervener its verified claim. On April 21, 1896, intervener received the notice that the Independence National Bank proposed to sell said warrants on the 26th of the same month. Intervener at once wired the bank that he trusted that they would have no trouble over the warrants, as they hoped to pay them in full shortly, to which the Independence National Bank made no reply. In October, 1896, intervener's attorney wrote said Independence National Bank relative to the warrant litigation treating the warrants as still in pledge. This was allowed to pass by the bank without reply. Following this, in May of 1897, intervener's attorney and the president of said Independence National Bank had an apparently amicable understanding relative to intervener's and said Independence National Bank's interest in these warrants, in which President Austin admitted that, if they got their claim and interest, they

would be satisfied. Thereafter intervener's attorney from time to time kept said Independence National Bank posted on the progress of the warrant suits, at all times treating the warrants as still in pledge. All these communications were allowed to pass without response from the Independence National Bank. Intervener's attorney was certainly looking after this litigation with a view to protecting intervener's interest in said warrants, and he must have been under an impression, engendered by the silence of said Independence National Bank and the conversation with its president, that intervener's interest in the warrants still existed. The intervener's attorney wrote to the Independence National Bank on the 15th of October, and used this language: "Referring to the city warrants which you hold as security for a loan due from the German-American Safe-Deposit & Savings Bank of this city, would say," etc. And in the latter part of this letter he used this language: "I think, however, everything will go through satisfactory, and that we will soon be able to adjust your claim in full." On July 12, 1897, in writing to said Independence National Bank, and in speaking of the first decision of this court, he uses this language: "This throws the warrant holders back upon the proposition of suing the city for money had and received, which we shall do as soon as it is finally determined that the supreme court refuses a rehearing. We herewith inclose you a copy of the decision. I shall write you as soon as the supreme court finally decides the motion above referred to." And on February 20, 1898, after the validity of the warrants was sustained, he writes: "I trust that we can now adjust matters between Receiver Balkwill and yourselves in accordance with the plan which I discussed with your Mr. Austin when in your city." This certainly shows that the intervener and his attorney were keeping close watch on the warrant litigation, and were in the belief that said Independence National Bank would not claim ownership to said warrants. The Independence National Bank, after receipt of these letters written by the intervener's attorney, by its silence, at least, induced the intervener to believe that his rights were unimpaired. Under all the circumstances of this case we think that there is nothing from which it might be concluded that the intervener in any way ratified the sale of these warrants, and we are unable to see wherein he was guilty of laches in asserting his claim to them. We conclude that the sale of the warrants by the Independence National Bank to itself under the circumstances disclosed in this case was for the sole purpose of obtaining title to the warrants, and not for the purpose of realizing thereon in discharge of the indebtedness for which they were pledged; and, being of this opinion, it is unnecessary to further consider whether or not the sale was made on proper notice, and the other questions discussed in the briefs. The judgment of the lower court is therefore affirmed.

Reavis, C. J., and Fullerton and Anders, JJ., concur.

THOMPSON

v.

TOWN OF ELTON.

(*Supreme Court of Wisconsin, March 19, 1901.*)

[85 N. W. Rep. 425.]

Municipal Loan—Officer Having Apparent Authority—Money Had and Received.*—Where officers of a municipality, assuming to act for it, and having apparent authority, borrowed money to be used for a lawful purpose, and it is so used, for the benefit of the city, the law will imply a promise to return the same, on which an action for money had and received will lie.

Pleading—Complaint No More Definite in Form Than Required by Common Law Sufficient.—A complaint for money had and received, no more definite in form than is required by the rules of the common law, is not demurrable for failure to comply with Rev. St. 1898, § 2646, requiring a complaint to contain a plain and concise statement of the facts constituting the cause of action, since section 2668 requires the allegations of a pleading, for the purpose of determining their effect, to be liberally construed, with a view to substantial justice between the parties.

Appeal from circuit court, Langlade county: John Goodland, Judge.

Action by Robert Thompson against the town of Elton. From a judgment for plaintiff, defendant appeals. Affirmed.

Action for money had and received, the following facts being stated in the complaint as constituting plaintiff's cause of action, formal parts omitted: June 18, 1894, the chairman and clerk of the defendant town, for the purpose of obtaining for it from Frances E. Babcock a loan of $3,000, represented to her that they were duly authorized by such town to obtain such a loan on five years time at 8 per cent. interest per annum, payable annually, and that the money when obtained would be used for proper and legitimate town purposes. Said Frances E. Babcock believed such representations to accord with the truth, and, relying thereon, loaned $3,000 to defendant, and delivered the same to the chairman of its board of supervisors. Thereafter such chairman turned the money over to the town treasurer and it became a part of the public money of the town. Thereafter such money was used for legitimate town purposes, so that defendant had the full benefit thereof. The chairman and clerk of defendant agreed in its behalf that the money should be repaid at the end of

*See notes at end of case.

five years from June 18, 1894, with interest at the rate of 8 per cent. per annum payable annually. Defendant has neglected and refused to pay said loan, or any part thereof, or the interest thereon except interest to June 18, 1896, and $49.04 of the interest due July 6, 1897. The town has repeatedly ratified such loan and the use thereof. Prior to June 18, 1899, the county of which defendant is a part, pursuant to action taken by its county board, paid defendant $928 to be used in discharge of said loan so far as the same would go for that purpose. Instead of its being so used, it was diverted from the purpose intended, but was used for legitimate town purposes, so that defendant had the full benefit thereof. Before March 24, 1900, the claim against defendant on account of the facts stated was for value duly assigned to plaintiff, who is the owner and holder thereof. After such assignment, plaintiff duly filed a verified claim with the defendant, to be placed before its auditing board as required by law. Thereafter an annual town meeting of the town was held, and more than 10 days elapsed subsequent to such meeting before the commencement of this action. Favorable action as to plaintiff's claim was neither taken by the board of audit of the town nor the electors at such town meeting.

The defendant demurred on the ground that the facts stated were insufficient to constitute a cause of action. The demurrer was overruled. This appeal is from the order entered on such decision.

M. J. Wallrich, C. F. Dillett, Sanborn, Luse, Powell & Ellis and A. L. Sanborn, for appellant.

J. C. Kerwin, for respondent.

Marshall, J. (after stating the facts). It is considered that this case is ruled against appellant by Paul v. City of Kenosha, 22 Wis. 266, Smith v. Board, 44 Wis. 686, Brodhead v. City of Milwaukee, 19 Wis. 624, and Lafebre v. Board, 81 Wis. 660, 51 N. W. 952,—particularly by the first and last of such cases. The principle of those cases is that municipalities are bound by moral obligations, as well as individuals, and that where, in case of the latter, such an obligation will give rise to a legal liability, it may have the same effect as to a municipality: that if a municipality obtains money of a person by an illegal sale of property to him, or an illegal contract of some kind, not expressly prohibited by law nor tainted by moral turpitude so that courts on grounds of public policy will not recognize it or the relations growing out of it, to grant relief, and such person acts in good faith in parting with his money, believing the same to be for the benefit of the municipality, and the latter uses the money for its legal and legitimate purposes, to that extent the law will imply a promise to return the same, upon which an action for money had and received will lie. "Justitia nemini neganda est," applies even to a person deal-

ing with a public corporation. Whether that doctrine is a safe rule in public affairs, and will successfully stand the test of experience, may well be doubted. There might be a wide difference of opinion about it if the matter were open for consideration as an original question. The courts in other states are by no means in harmony in regard to it. However, it has been too long the law of this state to be changed by mere judicial action. The way is open for the legislature to deal with the subject at any time. From the fact that the law as declared by the court has stood without any attempt by the legislature to change it for over 30 years, we must presume that it accords with the public will.

Counsel for appellant contend that this case can be distinguished from Paul v. City of Kenosha, which is to some extent true as to the facts, though in no essential particular, it is believed. But certainly there is no difference between the two in principle. In this case the money was obtained by the officers of appellant, assuming to act in its behalf and having the appearance of authority, to be used for lawful town purposes, and it was so used. In the Paul Case the money was obtained of the individual in the same way, as a consideration for the sale of bonds previously made for another purpose, issued therefor, and thereafter acquired by the municipality. The reissue of the bonds was illegal, though, as supposed, for a legitimate purpose; and the money was used for such purpose, though the bonds were as worthless as so much waste paper. No reason is perceived why the case would have been different if, instead of making use of the canceled bonds to obtain the money, the city, without authority, had made a new bond for the purpose, or obtained the money without going through the form of issuing a bond at all. The implied promise upon which the recovery was sustained arose, not from the loan of money to the municipality, nor the illegality of the means used to obtain it, but from the fact that the city, having possession of money to which it had no legal right, used the same for lawful municipal purposes. The implied promise sprang into life at the instant the money was used as a part of the public funds and for purposes for which public money would otherwise have been used.

The authorities that support a municipal liability under circumstances above indicated are too numerous to warrant an attempt to cite all of them. Salt Lake City v. Hollister, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176; Pimentel v. San Francisco, 21 Cal. 351, 362; Louisiana v. Wood, 102 U. S. 294, 26 L. Ed. 153; Read v. City of Plattsmouth, 107 U. S. 568, 2 Sup. Ct. 208, 27 L. Ed. 414; Gause v. Clarksville, 5 Dill. 165, 180, Fed. Cas. No. 5,276; Allen v. Intendant and Councilmen of Town of Lafayette, 89 Ala. 641, 8 South. 30, 9 L. R. A. 497; Scofield v. City of Council Bluffs, 68 Iowa, 695, 28 N. W. 20.

Much time might be spent in reviewing the foregoing and

other cases, but it is thought that nothing after all could be added to what has already been said in previous decisions of this court to which we have referred, so we forego further discussion.

It is firmly established here that the doctrine of ultra vires cannot be invoked by a corporation, in the absence of some prohibitory law, to protect itself from liability to refund money which it has received and had the legitimate benefit of. That is most generally invoked in cases where private corporations are involved, but it applies just the same to public corporations, where the individual dealing with the corporation acts in good faith,—that is, parts with his money or property to the corporation believing that it has a lawful right to acquire it.

Some complaint is made that, admitting the principle contended for by respondent's counsel, the complaint is insufficient because it does not show, by proper allegations of facts, that the money received by appellant was used for lawful town purposes; that the general allegation to that effect is a conclusion of law. We cannot agree to that. Whether the money was used for legitimate town purposes or not is a question of mixed law and fact that may properly be pleaded according to the legal effect of the facts. Board of Supervisors of Iowa Co. v. Mineral Point R. Co., 24 Wis. 93. At most the complaint was open to a motion to make more definite and certain. In a complaint for money had and received under the old system of pleading, the facts were pleaded according to their legal effect, and it has been repeatedly held that a statement of facts good at the common law in actions like this, is sufficient under the Code. Bliss, Code Pl. 299, and cases cited. In McKinnon v. Vollmar, 75 Wis. 82, 43 N. W. 800, 6 L. R. A. 121, a complaint in such an action, containing the very meager common-law allegations, was sustained. No particulars of the claim were stated in the complaint, and there was no bill of particulars given or demanded. It is possible that the framers of the Code did not contemplate such a result of their work when they said, "The complaint shall contain a plain and concise statement of the facts constituting each cause of action, without unnecessary repetition;" but such construction was adopted by the courts in the state from which we took the Code, before its adoption here, though at a time when there was a strong inclination to hold onto old forms and ingraft them onto the new system so far as possible. That was done, and it is believed the courts went beyond reason in some cases. But in respect to the matter under discussion, it may well be said that if a complaint for money had and received, no more definite in form than is required by the rules of the common law, does not come within the letter of section 2646, Rev. St. 1898, as to containing a plain and concise statement of the facts constituting the cause of action, it cannot be held bad on demurrer, since the statute requires the allegations of a pleading, for the purpose of determining

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their effect, to be liberally construed with a view to substantial justice between the parties. Section 2668, Rev. St. 1898. That requires that every reasonable intendment and presumption shall be made in favor of a pleading. Morse v. Gilman, 16 Wis. 504; Miller v. Bayer, 94 Wis. 123, 68 N. W. 869. If the language of a complaint will reasonably admit of a construction that will support it, that construction is to be sought for and adopted when found, instead of one that will condemn it. To that end all facts reasonably inferable from facts expressly alleged are to be deemed set forth and as forming a part of the pleading. Kliefoth v. Iron Co., 98 Wis. 495, 74 N. W. 356; Zinc Carbonate Co. v. First Nat. Bank of Shullsburg, 103 Wis. 125, 79 N. W. 229; Manufacturing Co. v. Goodrick, 103 Wis. 436, 78 N. W. 1096.

We should say before closing this subject that in Paul v. Kenosha, the allegation as to the use of the money was substantially the same as in the case before us, and it does not appear to have occurred to court or counsel then that the complaint was insufficient. This is the language: "The money was solicited and received by the defendant for the legitimate municipal purposes of the defendant, and not for any other or different purpose. It was placed in the city treasury with the other money and funds of such city, kept and used for municipal purposes, and wholly used by the defendant for its legitimate municipal purposes."

What has been said requires the order appealed from to be affirmed.

So ordered.

NOTES.

MUNICIPAL INDEBTEDNESS.

I. Power to Borrow.
   (a) Notice.
   (b) Implied.
   (c) To Be Construed Strictly.
   (d) Power to Issue Negotiable Securities.

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(n) Consolidation—Division—Succession—De Facto Corporation.
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III. Refunding.
(a) Power to.
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V. Implied Contract.
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(b) City Having Authority in First Instance.
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(d) City Already Indebted to Limit.
VII. Misapplication of Proceeds.
VIII. Statute of Limitations.
IX. Impairment of Obligation of Contract.

I. POWER TO BORROW.

(a) **Notice.**—Where the selectmen of a town were duly authorized to borrow money in various sums and at different times, giving the town's promissory notes therefor, and afterwards at other times, without authority, borrowed various sums for which they executed promissory notes, in which they were styled "agents" of the town, it was held that their former authorized acts did not so clothe them with apparent authority as agents, general or special, as to warrant the parties plaintiff in the unauthorized transactions to assume without further inquiry that they were acting under due authority. Smith *v.* Town of Epping (N. H.), 45 Atl. Rep. 415. Persons dealing with the officers and agents of a municipal corporation must at their peril take notice of the extent and limit of the authority of such agents and also of the corporation itself. When the corporate agents transcend their authority the corporation is not bound, and may successfully interpose the plea of *ultra vires* to actions on such contracts. Clark *v.* City of Des Moines, 19 Iowa 199, 87 Am. Dec. 423; La Porte *v.* Gamewell Fire-Alarm Tel. Co., 146 Ind. 466, 35 L. R. A. 686, 58 Am. St. Rep. 359; Nashville *v.* Ray, 19 Wall. 468; City of Ottawa *v.* Carey, 108 U. S. 110; Thomas *v.* City of Richmond, 12 Wall. 349; City of Indianapolis *v.* Wann (Ind.), 31 L. R. A. 743; McDonald *v.* The Mayor, 68 N. Y. 542, 23 Am. Rep. 144; Wells *v.* Town of Salina (N. Y.), 7 L. R. A. 759; Sutro *v.* Pettit, 74 Cal. 332, 5 Am. St. Rep. 442; Nat. Bank of Decorah *v.* Township of Doon, 86 Iowa 330, 41 Am. St. Rep. 489; McAleer *v.* Argell, Tr., (R. I.), 36 Atl. Rep. 588.

"It is the recognized doctrine that whoever contracts with a municipality must, at his peril, take notice of the powers conferred by its charter and whether the proposed indebtedness is in excess of the limitations imposed thereby." Rubber Mfg. Co. *v.* Ogalalla, 40 Neb. 775, 42 Am. St. Rep. 696; Winchester *v.* Redmond, 93 Va. 711, 57 Am. St. Rep. 822; Smith *v.* Broderick, 107 Cal. 644, 48 Am. St. Rep. 167. Where statute forbids the issue of county bonds to an amount greater than a certain

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percentage of the taxable value of the property in the county, such value and the amount of indebtedness being ascertainable from public records, all parties taking the bonds are affected with notice, and the county is not estopped from denying their validity. Francis *v.* Howard County, 54 Fed. Rep. 487; Travelers Ins. Co. *v.* Township of Oswego, 55 Fed. Rep. 361. And no recitals in the bonds will estop the county from setting up the invalidity. Quaker City Bank *v.* Nolan County, 66 Fed. Rep. 883; Mercer County *v.* Trust Company, 72 Fed. Rep. 623; Citizens' Bank *v.* City of Terrell, 78 Tex. 456, 14 S. W. Rep. 1003; Nolan County *v.* State, 83 Tex. 183, 17 S. W. Rep. 823; Francis *v.* Howard County, 54 Fed. Rep. 487, 4 C. C. A. 460; Millsaps *v.* City of Terrell, 8 C. C. A. 554, 60 Fed. Rep. 193; City of Santa Cruz *v.* Waite, 98 Fed. Rep. 387.

(b) Implied.—"Taken in its broad sense, the power to borrow money and issue bonds therefor cannot be said to be among the implied powers of a municipal corporation. For general purposes such power does not exist, for the reason that it is not necessary for the objects for which it was created. But in a limited sense, for the purpose of providing for such expenditure as is strictly germane to the objects for which such corporations are created, the power to borrow money is one of the inherent powers of municipal corporations." City of Williamsport *v.* Com., 84 Pa. St. 487, 24 Am. Rep. 220, citing Bank of Chillicothe *v.* Mayor of Chillicothe, 7 Hannum (Ohio) 354; Sturtevant *v.* City of Alton, 3 McLean 393; Mullarky *v.* Cedar Falls, 19 Iowa 21; City of Galena *v.* Corwith, 48 Ill. 423; Mills *v.* Gleason, 11 Wis. 470; Ketchum *v.* City of Buffalo, 14 N. Y. 356; Kelley *v.* Mayor of Brooklyn, 4 Hill (N. Y.) 263; Clark *v.* School District, 3 R. I. 199; First Municipality of New Orleans *v.* McDonough, 2 Robinson 244; Clark *v.* City of Des Moines, 19 Iowa 199; Adams *v.* R. R. Company, 2 Caldwell (Tenn.) 645; Com. *ex rel.* Rainboth *v.* Council of Pittsburgh, 5 Wright 284. And authority by statute to borrow money to the amount of $200,000 and issue bonds therefor, does not limit the inherent power of the city to issue bonds beyond that amount for municipal purposes. City of Williamsport *v.* Com., 84 Pa. St. 487. In Mills *v.* Gleason, 11 Wis. 470, 78 Am. Dec. 721, it is said: "In the absence of any restriction, a municipal corporation has, as incidental to its general powers conferred by charter, authority to borrow money and issue bonds therefor, and it is not deprived of such power by having conferred upon it the power to tax." And, see similar language in Bank of Chillicothe *v.* Chillicothe, 7 Ohio, Part II., 31, 30 Am. Dec. 185. Having this power, they may provide for the payment of their debts in such mode as they and the holders of the indebtedness may agree upon. City of Galena *v.* Corwith, 48 Ill. 423, 95 Am. Dec. 557. *Contra*: That a city has no implied power to borrow money, see Hackettstown *v.* Swackhamer, 37 N. J. L. 191; Wilson *v.* Shreveport, 29 La. Ann. 673; Gause *v.* Clarksville, 5 Dill. 165; Wells *v.* Salina (N. Y.), 7 L. R. A. 759; Nashville *v.* Ray, 19 Wall. 468; Marsh *v.* Fulton County, 10 Wall. 676; Kenicott *v.* Supe'rs Wayne County, 16 Wall. 452.

(c) **To Be Construed Strictly.**—Municipal corporations may create debts in the accomplishment of any object clearly within their corporate powers and reasonably essential to the attainment of their charter purposes, and such debts may be evidenced by warrants drawn on their disbursing officers; but a municipal corporation has no implied power to

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borrow money to pay debts so created. Allen *v.* Intendant of Lafayette (Ala.), 9 L. R. A. 497; Claiborne County *v.* Brooks, 111 U. S. Rep. 400. The power to "raise" money for municipal purposes does not include the power to borrow. Wells *v.* Town of Salina (N. Y.), 7 L. R. A. 759.

A city has no authority to borrow money for the purpose of making a donation to a private manufacturing concern, and bonds issued to raise money for such a purpose are absolutely void. Bissell *v.* City of Kankakee, 64 Ill. 249, 16 Am. Rep. 554; Loan Association *v.* Topeka, 20 Wall. 655.

Where a municipal corporation has authority to purchase property it has authority to issue bonds to pay for it; but a city may not in such case sell its bonds for the purpose of obtaining money to pay for the property. Issuing bonds to pay for property purchased is a very different thing from issuing bonds to obtain money. State *v.* Hauser, 63 Ind. 155; Gas Company *v.* City of Rushville, 121 Ind. 206, 16 Am. St. Rep. 388.

A general provision in a city charter that it shall have power to borrow money, not exceeding $15,000, for general city purposes, is to be construed strictly, and does not authorize the city to borrow money for the purpose of making a donation to a railroad, nor to issue negotiable bonds for any purpose. City of Brenham *v.* German-American Bank, 144 U. S. 173; Bangor Sav. Bank *v.* City of Stillwater, 46 Fed. Rep. 899. And where, under statute, a city has authority to issue bonds to aid in the construction of a railroad, such authority is to be construed strictly, and carries no power to issue negotiable bonds. And where negotiable bonds have been issued thereunder, no action can be maintained upon the theory of treating them as though they were non-negotiable. Dodge *v.* City of Memphis, 51 Fed. Rep. 165; Lehman *v.* City of San Diego, 83 Fed. Rep. 669; Board of Education *v.* Blodgett, 155 Ill. 441, 46 Am. St. Rep. 348; Tukey *v.* Omaha, 54 Neb. 370, 69 Am. St. Rep. 711.

(d) **Power to Issue Negotiable Securities.**—In the absence of express authority or irresistible implication, a municipal corporation has no power to borrow money and issue negotiable securities therefor. But it may issue warrants or orders negotiable in *form* so as to pass by indorsement or delivery. But such certificates are not negotiable in the hands of a *bona fide* holder so as to cut off defences thereto, especially when the ordinance under which they are issued, and which places certain restrictions upon them, is printed on the back thereof. Newgass *v.* City of New Orleans, 42 La. Ann. 163, 21 Am. St. Rep. 368; Watson *v.* City of Huron, 97 Fed. Rep. 449. A clause in a city charter which authorizes it to borrow money and issue bonds or certificates therefor does not authorize it to issue notes or bills of circulation. Thomas *v.* City of Richmond, 12 Wall. 349; City of Brenham *v.* German-American Bank, 144 U. S. 173; Bangor Sav. Bank *v.* City of Stillwater, 46 Fed. Rep. 899; State *v.* Mayor, etc., of City of Newark (N. J.), 23 Atl. Rep. 129; Dodge *v.* City of Memphis, 51 Fed. Rep. 165; Lehman *v.* City of San Diego, 83 Fed. Rep. 669; Nashville *v.* Ray, 19 Wall. 468.

II. CONSTITUTIONAL AND STATUTORY RESTRICTIONS.

(a) **Donation of Bonds.**—A municipal corporation cannot, even under express statutory authority, make a donation of its bonds in aid

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of a private manufacturing concern. The statute authorizing such a donation implies the power to levy taxes to pay such bonds, and the statute and the bonds are alike void. Loan Association *v.* Topeka, 20 Wall. 655; Allen *v.* Inhabitants of Jay, 60 Me. 124, 11 Am. Rep. 185; Lowell *v.* City of Boston, 111 Mass. 454, 15 Am. Rep. 39; Weisner *v.* Village of Douglas, 64 N. Y. 91, 21 Am. Rep. 586; Bissell *v.* City of Kankakee, 64 Ill. 249, 16 Am. Rep. 554.

(b) **City Park.**—By Iowa statute a park commission was created for each city of a certain class, and invested with authority to organize as a board and elect officers; also to acquire land for a public park by purchase and provide for the payment thereof by issue of bonds. Section 3 of Art. XI. of the state constitution provided: "No county or other political or municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount in the aggregate exceeding five per cent. of the taxable property within such county or corporation." It was held that the "Park Commission" for the city of Des Moines was not such a separate corporation from the municipal corporation of the city of Des Moines that it could incur debts and issue bonds in payment thereof, the city of Des Moines being already indebted to the constitutional limit. Orvis *v.* Park Commissioners, 88 Iowa 674, 45 Am. St. Rep. 252.

(c) **Debt Incurred Indirectly.**—Where a city is forbidden to incur indebtedness beyond a certain limit it may not do indirectly that which it is forbidden to do directly. Earles *v.* Wells, 94 Wis. 285, 59 Am. St. Rep. 886.

(d) **Corporate Purpose.**—Under a state constitution the corporate authorities of the state were forbidden to levy taxes for other than corporate purposes. Under such provision, a city, which under its charter, has power to borrow money, may issue bonds for corporate purposes only, and the improvement of the water power of rivers within the city or its vicinity is not a corporate purpose in the absence of authority to improve under its charter. City of Ottawa *v.* Carey, 108 U. S. 110.

(e) **Necessary Expenses.**—Under constitutional restriction prohibiting municipal corporations from borrowing money for other than necessary municipal expenses, the purchase of an electric light plant is held not to be a necessary expense, and the issuing of bonds for such purpose may be restrained. Mayo *v.* Town of Washington (N. Car.), 40 L. R. A. 163; Edgerton *v.* Goldsboro Water Co. (N. Car.), 48 L. R. A. 444. *Contra*: Jacksonville Electric Light Co. *v.* Jacksonville (Fla.), 30 L. R. A. 540; Crawfordville *v.* Broden (Ind.), 14 L. R. A. 268; Linn *v.* Chambersburg (Pa.), 25 L. R. A. 217. Where the constitution forbids a municipal corporation incurring indebtedness beyond a certain limit, "in any manner or for any purpose," it cannot exceed that limit even for necessary current expenses. Prince *v.* City of Quincy, 105 Ill. 138, 44 Am. Rep. 785; Sackett *v.* City of New Albany, 88 Ind. 473, 45 Am. Rep. 467.

Where the cost of repairing a street is such that it may be immediately paid from funds already in the city treasury, and it is so contracted to be paid, it is not a liability created within the provision limiting the city's indebtedness. Reuting *v.* City of Titusville (Pa.), 34 Atl. Rep. 916. And see Sener *v.* Borough of Ephrata (Pa.), 34 Atl. Rep. 954. A limitation upon the power of a city to borrow money is not a restriction upon the

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city's power to incur indebtedness for a sum beyond that amount upon a contract for public improvements. Hitchcock *v.* Galveston, 96 U. S. 341. But see *contra*, McAleer *v.* Angell, Tr., (R. I.), 36 Atl. Rep. 588. There is no question in such case where the statute makes an exception in case of street improvements. Denny *v.* City of Spokane, 79 Fed. Rep. 719.

(f) **Burden of Proof.**—One seeking to enjoin a municipal corporation from incurring further indebtedness on the ground that it would exceed the constitutional limit, has the burden of showing that such would be the fact. Linn *v.* Chambersburg (Pa.), 25 L. R. A. 217; City of Louisville *v.* Gosnell (Ky.), 60 S. W. Rep. 411.

(g) **Classification of Municipal Corporations—Assignment to Class.**—When the Kentucky constitution provides that cities of the fourth class shall not incur indebtedness beyond five per cent. of the value of their taxable property as shown by the last assessment list, a formal assignment of a city to the fourth class is not necessary to bring it within the operation of such provision, the provision itself being self executing. Beard *v.* Hopkinsville, 95 Ky. 239, 44 Am. St. Rep. 222, 23 L. R. A. 402.

(h) **Trust Funds.**—The city of Bangor was absolutely liable for a fund of $100,000 which it held upon certain trusts. In the exercise of its discretion as to the investment of the fund, it decided to use the whole sum in the erection of a public building, paying the beneficiaries 4½ per cent. interest thereon annually. *Held*, that as the city was already absolutely liable for the entire amount of the fund, and had discretionary powers as to its investment, the erection of a public building therewith was not an increase of indebtedness within the meaning of a constitutional provision limiting municipal indebtedness. Ayer *v.* City of Bangor (Me.), 27 Atl. Rep. 523.

(i) **Construction of Statute—Vote of Electors.**—Where the Georgia constitution provides that no debt exceeding one-fifth of one per cent. of the value of the taxable property therein shall be incurred by any municipal corporation in the state, without the consent of two-thirds of the qualified voters thereof at an election held for that purpose, *held*, that "two-thirds of the qualified voters" meant two-thirds of the entire number registered for that election, and not two-thirds of those voting. Gavin *v.* City of Atlanta, 86 Ga. 132, 12 S. E. Rep. 262.

A municipal corporation voted a bond issue for an amount which if it had been added to the existing indebtedness on the day of the election, would have exceeded the limit fixed by the constitution. Subsequent to the election, and before the issue of the bonds, the municipal debt was decreased by payments thereon to an amount which, with the proposed bond issue, did not exceed the constitutional limit. *Held*, that the bonds issued pursuant to such election were valid. Thompson-Houston Electric Co. *v.* City of Newton, 42 Fed. Rep. 723.

The charter of the city of Anderson forbade the issuing of bonds to a greater amount than $50,000, and further provided that before any issue could be made, it must be authorized by a majority vote of the qualified electors. Subsequently, a special act of the South Carolina legislature provided that for a certain purpose therein named, the city might issue bonds to the amount of $100,000, and repealed all prior acts and parts of

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acts in conflict therewith. *Held*, that this applied only to the limitation in the city charter as to the amount of bonds that might be issued, and not to the provision requiring the assent of a majority of the electors, the same not being in conflict therewith. State *ex rel.* Vandiver *v.* Tolly, 37 S. Car. 551, 16 S. E. Rep. 195.

(j) **Same—Funds Applicable.**—Where the legislature puts on foot a public improvement for the benefit of a municipality, and provides that the funds to pay therefor shall be raised by local assessments on the property specially benefited, and that the contractors be paid by warrants drawn on that fund, the mismanagement and wasting of the fund does not render the amount represented by the warrants a charge on the city. And *a fortiori* is this true when the city is indebted to the full constitutional limit. Peake *v.* City of New Orleans, 38 Fed. Rep. 779; Quill *v.* City of Indianapolis, 124 Ind. 292, 23 N. E. Rep. 788. See also, Wilder *v.* New Orleans, 87 Fed. Rep. 843; New Orleans *v.* United States, 49 Fed. Rep. 40.

(k) **Judgment—Collateral Attack—Res Judicata.**—Section 18 of Art. XI. of the constitution of California provides as follows: "No county, city, town, township, board of education, or school district shall incur any indebtedness or liability, in any manner or for any purpose exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election held for that purpose." Under this provision the city of San Francisco incurred a debt in its department of public works largely in excess of any amount available out of the income or revenue for that year. By resolution of city council, the city and county attorney was directed to confess judgment in favor of the plaintiffs and against the city for the amount. It was held, that this judgment could not be paid out of the income and revenue of the succeeding year, even though provision had been made therefor and a special tax levied to meet it, the tax not having been voted by two-thirds of the qualified electors as required by the constitution. Smith *v.* Broderick, 107 Cal. 644, 48 Am. St. Rep. 167.

A judgment against a municipal corporation does not create any debt within the meaning of a provision limiting municipal indebtedness; but it is conclusive evidence of a pre-existing debt. And where a levy has been made to pay such judgment, and the lands of a taxpayer have been returned delinquent thereunder, and sold, the judgment cannot be made the subject of collateral attack in a suit to enjoin the execution of the tax deed. Edmundson *v.* School District, 98 Iowa 639, 60 Am. St. Rep. 224; Grand Island, etc., R. Co. *v.* Baker, 6 Wyoming 369, 71 Am. St. Rep. 926; Mayor, etc., City of New Orleans *v.* United States, 49 Fed. Rep. 40; Chicago *v.* McDonald (Ill.), 52 N. E. Rep. 982.

Again, it is said: "Municipal bonds issued in payment of a valid judgment do not create any new debt. The judgment is merely evidence of an existing debt, and the bonds extend the time of its payment. Nor could the validity of the bonds be affected by any fraudulent agreement as to their issue if the judgment evidenced a valid debt, because the judgment was satisfied by the delivery of the bonds. There is no claim that the county sustained any loss or injury by the mere extension of the time of payment of the debt; and fraud without damage constitutes

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no cause of action, and no defence to a legal claim." Board Com'rs Lake County *v.* Platt, 79 Fed. Rep. 567.

(l) Periodical Payments—Water and Light Cases.—Under provision forbidding a city to incur indebtedness to an amount greater than 5 per cent. of its assessment list, a contract obligating it to pay $211,200 in thirty equal instalments extending over a like number of years, does not create a present liability for the whole amount, but only for the instalment next falling due. City of East St. Louis *v.* Gaslight & Coke Company, 98 Ill. 415, 38 Am. Rep. 97; South Bend *v.* Reynolds (Ind.), 57 N. E. Rep. 706, 49 L. R. A. 795; Cason *v.* City of Lebanon (Ind.), 55 N. E. Rep. 768; La Porte *v.* Fire-Alarm Tel. Co., 146 Ind. 466, 45 N. E. Rep. 598, 35 L. R. A. 686; Brown *v.* City of Corry, 175 Pa. St. 328, 34 Atl. Rep. 854; City of Erie's Appeal, 91 Pa. St. 398; City of Danville *v.* Danville Water Co. (Ill.), 54 N. E. Rep. 224; Cunningham *v.* City of Cleveland, 98 Fed. Rep. 657; Wade *v.* Borough of Oakmont (Pa.), 30 Atl. Rep. 959; Crowder *v.* Town of Sullivan, 128 Ind. 486, 28 N. E. Rep. 94; Saleno *v.* City of Neosho (Mo.), 27 L. R. A. 769; McBean *v.* Fresno, 112 Cal. 159, 53 Am. St. Rep. 191; Linn *v.* Chambersburg (Pa.), 25 L. R. A. 217; Water Company *v.* Walla Walla, 60 Fed. Rep. 957.

When a municipal corporation contracts for water or light, agreeing to pay annually therefor a specified sum for a certain number of years, the aggregate of those sums does not constitute an indebtedness within the meaning of Rev. Stats. Indiana, 1894, § 4377, prohibiting the city from incurring indebtedness without the consent of taxpayers. Foland *v.* Town of Frankton (Ind.), 41 N. E. Rep. 1031; Seward *v.* Town of Liberty (Ind.), 42 N. E. Rep. 39. But, under § 3822, applying to cities having one hundred thousand inhabitants, and providing that, "No executive department, officer or employee thereof, shall have power to bind such city by any contract, agreement or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of such department, and all contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriations, are declared to be absolutely void," and providing a penalty for any violation of these provisions, it was held that a contract to make periodical payments for lights was void and could not be ratified. Indianapolis *v.* Wann (Ind.), 31 L. R. A. 743, 42 N. E. Rep. 901. And see, holding generally that contracts for periodical payments do create liabilities in excess of constitutional and statutory restrictions, Chicago *v.* Galpin, 183 Ill. 399, 55 N. E. Rep. 731; Spilman *v.* City of Parkersburg, 35 W. Va. 605, 14 S. E. Rep. 279; Kiichli *v.* Brush Electric Company, 58 Minn. 418, 49 Am. St. Rep. 523; Merchants' Nat. Bank *v.* Spates, 41 W. Va. 27, 56 Am. St. Rep. 828; Beard *v.* City of Hopkinsville (Ky.), 44 Am. St. Rep. 241, 24 S. W. Rep. 872, 23 L. R. A. 402, and *note*; also, Mayfield Woolen Mills *v.* City of Mayfield (Ky.), 61 S. W. Rep. 43, *post* p. 750.

The constitutional limitation is not violated by the purchasing and paying cash for a fire-alarm telegraph though the city is already indebted beyond the constitutional limit and such expenditure is inexpedient and inadvisable. Brashear *v.* City of Madison, 142 Ind. 685, 33 L. R. A. 474. Nor is the claim arising from the breach of a contract to pay cash for street lights a debt contracted within a provision prohibiting indebtedness beyond a specified limit.

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The constitution of New York forbids cities of more than one hundred thousand population incurring indebtedness in excess of 10 per cent. of the assessed value of its taxable property except for the purpose of securing a water supply, for which it might issue water-supply bonds in excess of the ten per cent. limit; but such bonds must be accompanied by a sinking fund, and be limited to run not longer than twenty years. *Held*, that this exception did not apply to a bond issue of the city of Rochester, which, although having more than one hundred thousand inhabitants, was not indebted to anything like the ten per cent. limit; and that its water-supply bonds, limited to run fifty years, and not accompanied by the sinking fund, were valid. City of Rochester *v.* Quintard (N. Y.), 32 N. E. Rep. 760. See also, State *ex rel.* Stroud *v.* Consumers' Water Co. (N. J.), 28 Atl. Rep. 578.

The constitution of Illinois prohibits municipal corporations from incurring indebtedness beyond five per cent. of the value of the taxable property of the municipality. The charter of the city of Aurora forbids that municipality from borrowing more than $5,000 for any purpose in any year; and another section provides that the city council shall have power to levy taxes not exceeding one and one-half per cent. of the assessed value of the real and personal property within the city. A general statute of Illinois authorized cities, incorporated towns, and villages, to construct waterworks and provide for the erection and maintenance thereof by borrowing money, levying and collecting a general tax, etc. *Held*, that the provisions of the general statute were not limited or restricted in any way by the special provisions of the city charter; and a bond issue of $100,000 for waterworks purposes, being within the five per cent. constitutional limit, was valid and could not be enjoined. Dutton *v.* City of Aurora, 114 Ill. 138, 28 N. E. Rep. 461. Under this same constitutional provision, it is held that a city cannot create a liability beyond the limit by a contract for the removal of garbage, the contract calling for monthly payments by the city; and in determining the city's indebtedness, the cash in the treasury and uncollected taxes are not to be deducted. City of Chicago *v.* McDonald (Ill.), 52 N. E. Rep. 982.

(m) **Excess—Issue Void in Part.**—A municipal corporation, authorized to issue bonds bearing eight per cent. interest, issued bonds bearing twelve per cent. *Held*, that the issue was void as to the excess of interest, but was binding on the city with interest calculated at eight per cent. Quincy *v.* Warfield, 25 Ill. 317, 79 Am. Dec. 330. So where a city had authority to issue bonds to the amount of $100,000 to obtain money wherewith to improve a harbor, and it issued bonds largely in excess of that amount, such bonds were held void as to the excess. Hasbrouck *v.* City of Milwaukee, 13 Wis. 37, 80 Am. Dec. 718. And where authority was given to issue $40,000 of bonds, and $42,000 were issued, the issue was held void as to the $2,000 excess. Sutro *v.* Pettit, 74 Cal. 332, 5 Am. St. Rep. 442. See also, Culbertson *v.* City of Fulton, 127 Ill. 30, 18 N. E. Rep. 781. But, see Prickett *v.* City of Marceline, 65 Fed. Rep. 469, where, under similar circumstances, the issue was held void not only as to the excess, but altogether. Also, Coffin *v.* Indianapolis, 59 Fed. Rep. 221; City of Santa Cruz *v.* Waite, 98 Fed. Rep. 387.

(n) **Consolidation — Division — Succession—De Facto Corporation.**—The consolidation of two or more municipal corporations, all of which

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are indebted, some of them in excess of the constitutional limit, is not forbidden by the provision forbidding municipal corporations incurring debts to an amount greater than five per cent. of the value of their taxable property. True, Treasurer, *v.* Davis, Treasurer, (Ill.), 6 L. R. A. 266. A municipal corporation which succeeds to all the rights, property, and franchises of a village is bound by the obligations of the latter; and a retrospective act compelling the city to pay such debts is valid. Mayor City of Guthrie *v.* Territory of Oklahoma *ex rel.* Marquis D. Losey, 1 Okla. 188, 21 L. R. A. 841; State *ex rel.* Cooper *v.* Springer *et al.* (N. J.), 48 Atl. Rep. 605. Where there is a valid statute authorizing the organization of a municipal corporation, and a *bona fide*, though irregular, attempt to comply therewith, orders issued and debts incurred by such *de facto* municipality are enforceable against it. Gilkey *v.* Town of Howe, 105 Wis. 41, 49 L. R. A. 483. Where a city is divided and a new town created out of a portion of the territory, the original corporation retaining its name, property, and franchises, the new town is not, in the absence of statute, liable for any part of the debt of the original municipality. Morgan *v.* Beloit City and Town, 7 Wall. 613; Town of Depere *v.* Town of Bellevue, 31 Wis. 120, 11 Am. Rep. 602. Under Pennsylvania statute it is the duty of the court upon the formation of a new borough by detaching part of the territory of an old one, to appoint an auditor to adjust the liabilities of the two boroughs for prior existing indebtedness. Before the court had made such appointment, a special tax was levied by the new borough and applied to the liquidation of what it considered its fair proportion of such indebtedness. *Held*, that the court might validate such action by appointing the auditor and rendering a decree *nunc pro tunc*. Wade *v.* Borough of Oakmont (Pa.), 30 Atl. Rep. 959.

Where a *de facto* municipality is dissolved in a direct proceeding, and its territory returns to the town from whence it was taken, those towns become liable for the debts incurred while it maintained a *de facto* existence. Gilkey *v.* Town of Howe, 105 Wis. 41, 49 L. R. A. 483.

(o) Refunding.—Bonds issued for the purpose of refunding city indebtedness are not to be considered as creating any new indebtedness within a provision prohibiting indebtedness beyond a certain limit. Nor is it a violation of constitutional provision forbidding a city to borrow money for other than municipal purposes. Nat. Life Ins. Co. *v.* Mead, Tr. (S. Dak.), 48 L. R. A. 785; Poughkeepsie *v.* Quintard (N. Y.), 32 N. E. Rep. 764; Kane *v.* City of Charleston (Ill.), 43 N. E. Rep. 611; Powell *v.* City of Madison, 107 Ind. 106, 8 N. E. Rep. 31. Bonds which are absolutely void and of no validity whatever are to be excluded in computing the existing municipal indebtedness, and bonds issued in exchange therefor do increase the existing municipal indebtedness. The burden of proving that the cancelled issue was illegal and void is on the city; and misapplication of money received from the sale of the new issue is no defence against a *bona fide* holder. Reynolds *v.* Lyon County, 97 Fed. Rep. 155; Savings Bank *v.* Lyon County, 97 Fed. Rep. 159. Where a city issues bonds purporting to be refunding bonds, but which are in fact issued for another and fraudulent purpose, the city having no authority to refund its indebtedness, and the bonds being in excess of the constitutional limit, they are illegal and void in the hands

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of one claiming to be a *bona fide* holder, but who fails to prove that he paid value for them. John Hancock Life Ins Co. *v.* City of Huron, 80 Fed. Rep. 652.

(p) Generally.—See further on general subject of limitations and restrictions upon municipal indebtedness, Addyston Pipe and Steel Co. *v.* City of Corry (Pa.), 46 Atl. Rep. 1035; Bell *v.* Borough of Waynesboro (Pa.), 45 Atl. Rep. 930; School Town of Winamac *v.* Hess (Ind.), 50 N. E. Rep. 81; City Council of Dawson *v.* Dawson Waterworks Co., 106 Ga. 696, 32 S. E. Rep. 907; Pepper *v.* City of Philadelphia (Pa.), 37 Atl. Rep. 579; Houston *v.* City of Lancaster (Pa.), 43 Atl. Rep. 83; Chicago *v.* Fishburn (Ill.), 59 N. E. Rep. 791; Thompson Houston Electric Co. *v.* Newton, 42 Fed. Rep. 723; Wilder *v.* Rio Grande County Com'rs, 41 Fed. Rep. 512; Jones *v.* Hurlburt, 13 Neb. 125; Council Bluffs *v.* Stewart, 51 Iowa 385; Wilson *v.* Sanitary Dist. of Chicago Trustees, 133 Ill. 443; State *v.* Lancaster County Com'rs, 6 Neb. 214; Adams *v.* East River Sav. Inst., 136 N. Y. 52; List *v.* Wheeling, 7 W. Va. 501; Blanton *v.* McDowell County Com'rs, 101 N. Car. 532; Powell *v.* Madison, 107 Ind. 106; Poughkeepsie *v.* Quintard, 65 Hun 141; Bank for Savings in New York *v.* Grace, 102 N. Y. 314; Scott *v.* Davenport, 34 Iowa 208; Doon Dist. Twp. *v.* Cummins, 142 U. S. 366, 35 L. Ed. 1044, *reversing* Cummins *v.* Doon Dist. Twp., 42 Fed. Rep. 644; People *v.* Kelley, 5 Abb. N. Car. 383, 76 N. Y. 475; Laycock *v.* Baton Rouge, 35 La. Ann. 475; Lott *v.* Waycross, 84 Ga. 681; Hequembourg *v.* Dunkirk, 49 Hun 550; Lehigh Coal & Nav. Co.'s App., 112 Pa. 360; State *v.* McCauley, 15 Cal. 430; Jonas *v.* Cincinnati, 18 Ohio 318; Austin *v.* Seattle, 2 Wash. 667; Nelson *v.* New York, 63 N. Y. 535; Wallace *v.* San Jose, 29 Cal. 180; Merrill Ry. & Lighting Co. *v.* Merrill, 80 Wis. 358; Ætna Life Ins. Co. *v.* Lyon County, 44 Fed. Rep. 329; Prince *v.* Quincy, 105 Ill. 138, 44 Am. Rep. 785; Prince *v.* Quincy, 128 Ill. 443; Prince *v.* Quincy, 28 Ill. App. 490; Springfield *v.* Edwards, 84 Ill. 626; Sackett *v.* New Albany, 88 Ind. 473, 45 Am. Rep. 467; People *v.* May, 9 Colo. 80; Nougues *v.* Douglass, 7 Cal. 65; Spilman *v.* Parkersburg, 35 W. Va. 605; Barnard *v.* Knox County, 13 L. R. A. 244, 105 Mo. 282; State *v.* Columbia, 111 Mo. 365; Book *v.* Earl, 87 Mo. 246; Hebard *v.* Ashland County, 55 Wis. 145; Lake County *v.* Rollins, 130 U. S. 662, 32 L. Ed. 1060; Crowder *v.* Sullivan, 13 L. R. A. 647, 128 Ind. 486; Rice *v.* Keokuk, 15 Iowa 579; Grant *v.* Davenport, 36 Iowa 396; Tucker *v.* Raleigh, 175 N. Car. 267; Dwyer *v.* Brenham, 65 Tex. 526; Corpus Christi *v.* Woessner, 58 Tex. 462; Reynolds *v.* Shreveport, 13 La. Ann. 426; Comstock *v.* Syracuse, 5 N. Y. Supp. 874; Capital City Water Co. *v.* Montgomery, 92 Ala. 366; Law *v.* People, 87 Ill. 385; Springfield *v.* Edwards, 84 Ill. 626; East St. Louis *v.* Flannigan, 26 Ill. App. 449; Fuller *v.* Heath, 89 Ill. 296; French *v.* Burlington, 42 Iowa 614; Koppikus *v.* State Capitol Com'rs, 16 Cal. 248; Alpena *v.* Kelley (Mich.), Nov. 21, 1893; State *v.* Parkinson, 5 Nev. 15; Quill *v.* Indianapolis, 7 L. R. A. 681, 124 Ind. 292; Jacksonville R. Co. *v.* Jacksonville, 114 Ill. 567; Fuller *v.* Chicago, 89 Ill. 282; People *v.* Brooks, 16 Cal. 1; People *v.* Pacheco, 27 Cal. 175; Niles Waterworks *v.* Niles, 59 Mich. 311; Smith *v.* Newburgh, 77 N. Y. 130; State *v.* Atlantic City, 49 N. J. L. 558; Davenport *v.* Kleinschmidt, 6 Mont. 502; State *v.* Medbery, 7 Ohio St. 522; Erie's App., 91 Pa. 398; Caulson *v.* Portland, Deady 481; Carlyle Water, L. & P. Co. *v.* Carlyle, 31 Ill. App. 325; Val-

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paraiso *v.* Gardner, 97 Ind. 1, 49 Am. Rep. 417; Rome *v.* McWilliams, 67 Ga. 106; New Orleans Gaslight Co. *v.* New Orleans, 42 La. Ann. 188; Smith *v.* Dedham, 144 Mass. 177; Weston *v.* Syracuse, 17 N. Y. 110; Utica Waterworks *v.* Utica, 31 Hun 426; Thomas *v.* Burlington, 69 Iowa 140; Lewis *v.* Widber, 99 Cal. 412; McCracken *v.* San Francisco, 16 Cal. 591; Bloomington *v.* Perdue, 99 Ill. 329; Rice *v.* Des Moines, 40 Iowa 638; Bartle *v.* Des Moines, 38 Iowa 414; Chicago *v.* Sexton, 115 Ill. 230; Conyers *v.* Kirk, 78 Ga. 480; Grant County *v.* Lake County, 17 Or. 453; Potter *v.* Douglas County, 87 Mo. 239, *overruled by* Barnard *v.* Knox County, 105 Mo. 382, 13 L. R. A. 244; True *v.* Davis, 6 L. R. A. 266, 133 Ill. 522; Barnard & Co. *v.* Knox County, 37 Fed. Rep. 563; Welch *v.* Strother, 74 Cal. 413; Casbin *v.* Dunn, 58 Cal. 582; Norton *v.* East St. Louis, 36 Ill. App. 171; Baltimore *v.* Gill, 31 Md. 375; Ayer *v.* Bangor, 85 Me. 511; Board of Education *v.* Bolton, 104 Ill. 220; Atlantic City Waterworks Co. *v.* Atlantic City, 48 N. J. L. 378; Hudson *v.* Marietta, 64 Ga. 286; Logansport *v.* Dykeman, 116 Ind. 15; Gibbons *v.* Mobile & G. N. R. Co., 36 Ala. 410; Kitchum *v.* Buffalo, 14 N. Y. 356; Hitchcock *v.* Galveston, 96 U. S. 341, 24 L. Ed. 659; Galveston *v.* Heard, 54 Tex. 420; Galveston *v.* Loonie, 54 Tex. 517; State *v.* Fayette County Com'rs, 37 Ohio St. 526; Kimball *v.* Grant County Com'rs, 21 Fed. Rep. 45; Murphy *v.* East Portland, 42 Fed. Rep. 308; Salem Water Co. *v.* Salem, 5 Or. 30; Austin *v.* Seattle, 2 Wash. 667; Fowler *v.* Superior, 85 Wis. 411; Davis *v.* Des Moines, 71 Iowa 500; Strieb *v.* Cox, 111 Ind. 299; Baker *v.* Seattle, 2 Wash. 576; Winamac *v.* Huddleston, 132 Ind. 217; State *v.* Babcock, 24 Neb. 640; McPherson *v.* Foster, 43 Iowa 48, 22 Am. Rep. 215; Sutro *v.* Pettit, 74 Cal. 332; State *v.* Crete, 32 Neb. 568; Rollins *v.* Lake County, 34 Fed. Rep. 845; Lake County *v.* Rollins, 130 U. S. 662, 32 L. Ed. 1060; Litchfield *v.* Ballou, 114 U. S. 190, 29 L. Ed. 132; Burlington Water Co. *v.* Woodword, 49 Iowa 58; Dively *v.* Cedar Falls, 27 Iowa 227; State *v.* Hawes, 112 Ind. 323.

III. REFUNDING.

(a) **Power to.**—The power to borrow money and issue bonds for all municipal purposes includes the power to pay or refund the indebtedness of the municipality. Thus it is said, "A city being in debt, which is evidenced by scrip or by promissory notes, may change the form of indebtedness to interest bearing bonds, and this without any express authority in its charter. It is an inherent power and vital." City of Galena *v.* Corwith, 48 Ill. 423, 95 Am. Dec. 557; City of Huron *v.* Second Ward Sav. Bank, 86 Fed. Rep. 272, 49 L. R. A. 534.

(b) **What Are Refunding Bonds.**—The city of Indianapolis, under authority to issue refunding bonds in place of others that were about to fall due, prepared and advertised for bids on six hundred and twenty-one bonds of $1000 each. Of these bonds twenty-one were for the purpose of replacing in the treasury money which had been expended in meeting $21,000 of the city's obligations which had fallen due a short time before. *Held*, that as to this $21,000, the bonds were not refunding bonds, that particular debt being no longer an outstanding obligation against the city; that the illegality of the part went to the whole, and that the brokers who had bid on the entire $621,000 could not be made to accept that amount less the $21,000. Coffin *v.* City of Indianapolis, 59 Fed.

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Rep. 221. Under statute authorizing a city to refund all its outstanding indebtedness evidenced by bonds and warrants, it is not authorized to refund the bonds of a private water company of which it assumed the payment upon purchasing the waterworks; and including $89,000 of such bonds in the refunding issue of $360,000 invalidates the whole. City of Santa Cruz *v.* Waite, 98 Fed. Rep. 387.

(c) Estoppel—Estoppel Generally.—Where one not a *bona fide* holder of invalid bonds surrenders them for refunding bonds, the city is not estopped by any recital in the bonds from showing the invalidity of the former issue. Shaw *v.* School District, 62 Fed. Rep. 911; Cummins *v.* Township of Doon, 42 Fed. Rep. 644, *reversed* 142 U. S. 366, 12 Sup. Ct. Rep. 220.

The *bona fide* holder for value of refunding bonds, or of any negotiable bonds, fraudulently issued, or otherwise invalid, may recover when nothing appears on the face of the bonds, the city charter, public statutes, or state constitution, nor in any public record, to put the holder on notice. West Plains Township Meade County *v.* Sage, 69 Fed. Rep. 943; Mayor of Columbus *v.* Dennison, 69 Fed. Rep. 58; City of Cadillac *v.* Woonsocket Sav. Institution, 58 Fed. Rep. 935; Newberry *v.* Fox, 37 Minn. 141, 5 Am. St. Rep. 830; City of Huron *v.* Second Ward Sav. Bank, 86 Fed. Rep. 272, 49 L. R. A. 534; Loan Assn. *v.* Topeka, 20 Wall. 655; Weismer *v.* Village of Douglas, 64 N. Y. 91, 21 Am. Rep. 586; National Life Ins. Co. *v.* Mead, Tr., (S. Dak.), 48 L. R. A. 785; Travelers' Ins. Co. *v.* Township of Oswego, 55 Fed. Rep. 361; Francis *v.* Howard County, 54 Fed. Rep. 487; Prickett *v.* City of Marceline, 65 Fed. Rep. 469; Quaker City Nat. Bank *v.* Nolan County, 66 Fed. Rep. 883; Citizen's Bank *v.* City of Terrell, 78 Tex. 456, 14 S. W. Rep. 1003; Nolan County *v.* State, 83 Tex. 183, 17 S. W. Rep. 823; Millsaps *v.* City of Terrell, 8 C. C. A. 554, 60 Fed. Rep. 193; Mercer County *v.* Trust Co., 72 Fed. Rep. 623; City of Gladstone *v.* Throop, 71 Fed. Rep. 341; City of Evansville *v.* Dennett, 161 U. S. 434; City of Santa Cruz *v.* Waite, 98 Fed. Rep. 387. An Indiana statute provided that, "after refunding bonds shall have been negotiated, no action or proceeding shall be instituted, nor any defence to any action interposed by said city, or by any person or persons, the object of which shall be to impair the validity or depress the value of said bonds." *Held*, that the refunding bonds having passed into the hands of *bona fide* purchasers, the city would not be permitted to set up as a defence the invalidity of the previous issue. Myers *v.* City of Jeffersonville (Ind.), 44 N. E. Rep. 452. The face of a bond stated that the issue was made under authority of a certain statute. As a matter of fact, the statute had been repealed before the date of the issue, but the bonds were antedated to make it appear that they were issued before the repeal, and they were signed by officers who were not elected until subsequent to the repeal of the statute in question. *Held*, that as the holder of the bonds might have ascertained from the public records who were the city officials at the time of the false date, the city was not estopped, and the bonds were absolutely void. Leham *v.* City of San Diego, 83 Fed. Rep. 669.

A statute provided that a city ordinance should not only be "adopted," but also "published." There existed a public record by which com-

pliance or noncompliance with the statute might have been ascertained. The bonds recited that they were issued under an ordinance "adopted." *Held*, that the city was not estopped from setting up the fact that the ordinance was not published. Nat. Bank of Commerce *v.* Town of Grenada, 44 Fed. Rep. 262, 48 Fed. Rep. 278. See also, Coffin *v.* Board Com'rs Kearney County, 57 Fed. Rep. 137; Board Com'rs Kingman County *v.* Cornell University, 57 Fed. Rep. 149; Swan *v.* Arkansas City, 61 Fed. Rep. 478; Risley *v.* Village of Howell, 57 Fed. Rep. 544.

Where the only irregularity appearing in an issue of bonds is that the municipal corporation issuing them, while really a city, has issued them under its name as a village, it will be estopped to plead such technicality after the bonds have reached the hands of a *bona fide* holder. Cornell University *v.* Village of Maumee, 68 Fed. Rep. 418. Bonds issued by a municipal corporation having a *de facto*, but, owing to a mere irregularity in its organization, no legal existence, are enforceable unless it is declared by statute that such irregularity shall render its charter absolutely void, in which case, they will, of course, be of no validity whatever. Ruohs *v.* Athens, 91 Tenn. 20, 30 Am. St. Rep. 858; Gilkey *v.* Town of Howe, 105 Wis. 41, 49 L. R. A. 483. A consent judgment against a municipal corporation, wherein it is agreed as a compromise, that the town issue bonds for a smaller sum than was voted, entered into on the part of the city by officials who had no authority to do so, the city itself being without authority to issue the bonds, does not estop the city from setting up the total invalidity of the whole transaction. Com'rs Oxford *v.* Union Bank of Richmond, 96 Fed. Rep. 293. And where a city seeks to establish the invalidity of a bond issue on one ground, and a judgment goes against it, such judgment merely establishes the fact that the bonds are not invalid on that particular ground, and does not estop the city from attacking their invalidity on another ground in an action brought by different parties. Nor is the city estopped by having paid interest coupons on invalid bonds. Glenn *v.* Wray, Sheriff, (N. Car.), 36 S. E. Rep. 167; National Bank of Decorah *v.* Township of Doon, 86 Iowa 330, 41 Am. St. Rep. 489; Com'rs Oxford *v.* Union Bank of Richmond, 96 Fed. Rep. 293. All persons dealing with agents and officials of municipal corporations must at their peril take notice of the extent of the powers of such agents. City officials cannot create an estoppel against the city so as to render its illegal nonnegotiable securities valid in the hands of *bona fide* purchasers. Nashville *v.* Ray, 19 Wall. 468; Marsh *v.* Fulton County, 10 Wall. 676; Kenicott *v.* Supervisors of Wayne County, 16 Wall. 452; Newberry *v.* Fox, 37 Minn. 141, 5 Am. St. Rep. 830; McAleer *v.* Angell, Tr., (R. I.), 36 Atl. Rep. 588. Where a town treasurer has no authority to bind the town by promissory notes, except when duly authorized by the action of a town meeting, which meeting and its purpose was required to be duly advertised, the town cannot by mere acquiescence, by recognizing as valid notes signed by the treasurer during a long period of years, so hold him out as its general agent for such purposes as to estop itself from denying the binding force of such obligations. Town of Bloomfield *v.* Charter Oak Nat. Bank, 121 U. S. 121; Smith *v.* Town of Epping (N. H.), 45 Atl. Rep. 415.

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IV. WARRANTS.

Power to Issue—Negotiability—Usury—Illegality of Consideration.—In the accomplishment of any object clearly within the scope of their corporate powers and reasonably essential to the attainment of their charter purposes, municipal corporations may create debts and evidence them by warrants drawn on their disbursing officers. But the power to create debts is a different thing from the power to borrow money, and warrants drawn by municipal authorities for money borrowed without authority, are wholly worthless, and there is no legal obligation to pay them. Allen *v.* Intendant of Lafayette (Ala.), 9 L. R. A. 497.

County and city warrants negotiable in form are transferrable by delivery, and the holder may bring an action thereon in his own name. But they are not negotiable instruments in the sense of the law merchant so that when held by *bona fide* purchasers, evidence of their invalidity, or defences available against the original payee, will be excluded. The transferee takes them subject to all legal and equitable defences which existed while they were in the hands of the original payee. Wall *v.* Monroe County, 105 U. S. 74; Nashville *v.* Ray, 19 Wall. 475; Ouachita County *v.* Walcott, 103 U. S. 559; People *ex rel. v.* Johnson, 100 Ill. 537, 39 Am. Rep. 63; Clark *v.* City of Des Moines, 19 Iowa 199, 87 Am. Dec. 423; Watson *v.* City of Huron, 97 Fed. Rep. 449.

Warrants issued by a city in satisfaction of a judgment against it, at the rate of one dollar in warrants for each seventy five cents due on the judgment, are usurious, illegal, and void. Clark *v.* City of Des Moines, 19 Iowa 199, 87 Am. Dec. 423.

Warrants issued in exchange for illegal scrip, which was originally issued in payment of *bona fide* debts, or in exchange for valid city warrants, are valid, and not open to the defence of illegality of consideration. Clark *v.* City of Des Moines, 19 Iowa 199, 87 Am. Dec. 423.

V. IMPLIED CONTRACT.

(a) **Money Had and Received.**—Whether one who has parted with his money to corporate agents for the use of the city, such agents having no authority to borrow, or has laid it out in the purchase of city bonds, which for one reason or another are invalid, may recover against the city as for money had and received, the cases are conflicting. In some jurisdictions the distinction is drawn as to whether the city had authority in the first instance or not, or whether it could have authorized the officials in the first instance; in others, as to whether the security given was negotiable or not; in others whether the party plaintiff was affected with notice or acted in good faith; in others recovery is denied upon the ground of public policy; but perhaps the one proposition supported by the greatest majority of cases is, that no recovery can be had unless the money received was actually applied to proper municipal purposes. Upon reason and principle it would seem that where a city or its agents are forbidden to borrow money or create debts, no recovery should be allowed upon an implied contract for money or materials advanced, as it enables the municipality and its agents to accomplish indirectly the very thing they are forbidden to do directly; and the doctrine of constructive notice as applied to all persons dealing with municipalities and their agents, lends great strength to this view. Thus it is held,

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that where bonds are issued in violation of constitutional restriction, no recovery can be had for the money paid therefor, either on the bonds or on an implied contract. To allow a recovery for money had and received would be to sanction the city's doing indirectly that which it was forbidden to do directly. Morton *v.* City of Nevada, 41 Fed. Rep. 582.

In Travelers' Ins. Co. *v.* Mayor of Johnson City, 99 Fed. Rep. 663, 49 L. R. A. 123, a municipal corporation without authority of law issued bonds to aid a railway company in constructing its depot and laying its tracks within city limits. It was held that the bonds were absolutely void, and that no recovery could be had as for money had and received, the benefits received from the construction of the road being too indirect and remote to sustain such an action. In Thomas *v.* City of Richmond, 12 Wall. 349, recovery on the implied contract was denied on the ground that all persons dealing with corporate agents are affected with notice of the extent of their powers. And in Wells *v.* Town of Salina (N. Y.), 7 L. R. A. 759, it was held that no recovery could be had on an implied contract even though the money had been applied to proper municipal purposes. See also, Hackettstown *v.* Swackhamer, 37 N. J. L. 191. But the weight of authority, perhaps, is in favor of recovery, especially where the money has been applied to proper municipal purposes. Thus, "Where the money borrowed was used for purposes authorized by municipal charter, there is a legal liability resting upon the municipality—an implied assumpsit—to repay, not the amount borrowed, but the amount received and used for corporate purposes." Allen *v.* Intendant of La Fayette (Ala.), 9 L. R. A. 497. Also, FIELD, C. J., in Argenti *v.* San Francisco, 16 Cal. 255; Salt Lake City *v.* Hollister, 118 U. S. 256; Primental *v.* San Francisco, 21 Cal. 362; Clark *v.* Salina County, 9 Neb. 516. "The obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independently of any statute, will compel restitution or compensation." Marsh *v.* Fulton County, 10 Wall. 676; Nashville *v.* Ray, 19 Wall. 468; Louisiana *v.* Wood, 102 U. S. 294; New Orleans *v.* Clark, 95 U. S. 644; Read *v.* City of Plattsmouth, 107 U. S. 568; Miltenberger *v.* Cooke, 18 Wall. 421; Chapman *v.* County of Douglas, 107 U. S. 348; Savings Bank *v.* City of Stillwater, 46 Fed. Rep. 899; Bank of St. Paul *v.* School Dist. No. 52, 3 N. Dak. 496, 28 L. R. A. 642; Paul *v.* Kenosha, 22 Wis. 266, 94 Am. Dec. 598; Hoag *v.* Town of Greenwich, 133 N. Y. 152; 30 N. E. Rep. 842; Dodge *v.* City of Memphis, 51 Fed. Rep. 165; Watson *v.* City of Huron, 97 Fed. Rep. 449; Huron Waterworks Company *v.* City of Huron, 7 S. Dak. 9, 62 N. W. Rep. 981, 30 L. R. A. 848.

(b) **Benefits Received.**—A city is liable upon a *quantum meruit* for benefits received under a contract made by a committee of the common council, the same not relating to the government of the city, but being merely a business matter and ministerial in its nature. Kramrath *v.* City of Albany, 127 N. Y. 575, 28 N. E. Rep. 400; City of Conyers *v.* Kirk, 78 Ga. 48, 30 S. E. Rep. 442; Hitchcock *v.* Galveston, 96 U. S. 341; Wentink *v.* Board Freeholders Passaic County (N. J.), 48 Atl. Rep. 609.

Where the holders of valid municipal bonds exchange them for bonds of a new issue, which prove to be invalid because of want of power on the part of the city to issue them, the city cannot maintain a suit to

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have such new issue delivered up and cancelled without accounting to defendants for the value of the bonds which they surrendered. Brown *v.* City of Atchison, 39 Kansas 37, 7 Am. St. Rep. 515.

But where a certain contract is forbidden under a penalty it is absolutely void, and no recovery can be had either on a *quantum valebant*, *quantum meruit*, or any other count whatsoever. Berka *v.* Woodward, 125 Cal. 119, 73 Am. St. Rep. 31.

VI. RATIFICATION.

(a) **By Statute.**—Where a city issues its obligations illegal in form only, it may cancel them and issue others in place thereof which will be valid and binding. And where the consideration of an illegal contract is morally good, it may be validated by statute. City of Little Rock *v.* Merchants' Nat. Bank, 98 U. S. 308; County of Lee *v.* Evans Rogers, 7 Wall. 666; Steel County *v.* Erskine, 98 Fed. Rep. 215.

Where a bank advances money to a municipal corporation, knowing that the corporation is without authority to receive the loan, but relying on the legislature to enact a statute ratifying the loan, and taking as additional security an assignment of the claims which were paid by the money advanced to the city, a subsequent ratification by the legislature will validate the loan. Mayor City of New York *v.* Tenth Nat. Bank, 111 N. Y. 446, 18 N. E. Rep. 618; Dows *v.* Town of Elmwood, 34 Fed. Rep. 114; Deyo *v.* Otoe County, 37 Fed. Rep. 246; Schenk *v.* City of Jeffersonville (Ind.), 52 N. E. Rep. 212.

(b) **City Having Authority in First Instance.**—Where a municipal corporation has authority in the first instance, it may ratify and render valid acts which otherwise would have remained invalid. Mills *v.* Gleason, 11 Wis. 470, 78 Am. Dec. 721; McCormick's Appeal, 165 Pa. St. 386, 44 Am. St. Rep. 671; Bell *v.* Borough of Waynesboro (Pa.), 45 Atl. Rep. 930. Where in Connecticut a town treasurer has no authority to bind the town by promissory notes except when authorized by a town meeting held specially for that purpose, which meeting is required to be duly advertised, the town cannot validate such notes by mere acquiescence and recognizing the notes as valid for a period of years, but only by a special meeting, duly called and advertised as required by law in the first instance. Town of Bloomfield *v.* Charter Oak Nat. Bank, 121 U. S. 121. If the contract is invalid because in violation of the mandatory provisions of some statute, it can be ratified only in the manner laid down by the statute, but if the statute is directory merely, it may be ratified in some other mode. Rubber Mfg. Co. *v.* Ogalalla, 40 Neb. 775, 42 Am. St. Rep. 696.

(c) **Contract Wholly Ultra Vires.**—A contract made by corporate agents, which was wholly *ultra vires* and beyond the power of the city to make in any instance, and *a fortiori* if it come within a class declared by statute to be absolutely void, whether express or implied, is incapable of being ratified by the city. McAleer *v.* Angell, Tr., (R. I.), 36 Atl. Rep. 588; Indianapolis *v.* Wann (Ind.), 42 N. E. Rep. 901, 31 L. R. A. 743.

(d) **City Already Indebted to Limit.**—A city already indebted to the constitutional limit cannot ratify indebtedness incurred by city officials, though it might properly have contracted such indebtedness but for the limit imposed. La Porte *v.* Gamewell Fire Alarm Tel. Co., 146 Ind. 466, 35

L. R. A. 686, 58 Am. St. Rep. 359. But where certain warrants at the time of their issuance, together with the other existing indebtedness of the city, did not exceed the constitutional limit, they may be validated by an election held for that purpose, although at the time of the election the city indebtedness does exceed the limit fixed by law. West *v.* Chehalis, 12 Washington 369, 50 Am. St. Rep. 896.

VII. MISAPPLICATION OF PROCEEDS.

That a municipal corporation has squandered and misapplied the proceeds of negotiable securities which it has placed upon the market is no defence to an action brought by a *bona fide* purchaser for value. Nat. Life Ins. Co. *v.* Board of Education, 62 Fed. Rep. 784; County Com'rs *v.* Beal, 113 U. S. 227, 5 Sup. Ct. Rep. 433; Cairo *v.* Zane, 149 U. S. 122, 13 Sup. Ct. 803; Maxey *v.* Williamson County, 72 Ill. 207. See also, Clifton Forge *v.* Alleghany Bank, 92 Va. 283, 23 S. E. Rep. 284; Risley *v.* Village of Howell, 64 Fed. Rep. 453; Hackett *v.* Ottawa, 99 U. S. 86; Jones *v.* City of Camden, 44 S. Car. 319, 23 S. E. Rep. 141.

VIII. STATUTE OF LIMITATIONS.

Wherever under the statute of limitations title to property has vested, the bar of the statute becomes a vested right, and a repeal does not revive the former owner's right of action. But in any case of debt, the bar of the statute goes only to the remedy and not to the right, and in such case there can be no vested right to the bar raised by the statute. Campbell *v.* Holt, 115 U. S. 620, 6 Sup. Ct. Rep. 209. *Contra*: Board of Education *v.* Blodgett, 155 Ill. 441, 46 Am. St. Rep. 348.

IX. IMPAIRMENT OF OBLIGATION OF CONTRACT.

A state having, when bonds were issued, construed its statutes and constitution so as to render them valid, cannot by a subsequent construction destroy them. Thompson *v.* County of Lee, 3 Wall. 327. See also, St. Paul Gaslight Company *v.* City of St. Paul, 21 Sup. Ct. Rep. 575; same case below, 78 Minn. 39, 80 N. W. Rep. 774.

CITY OF LOUISVILLE

v.

GOSNELL *et al.*

(Court of Appeals of Kentucky, Jan. 25, 1901.)

[60 S. W. Rep. 411.]

Appropriation for Street Repairs.—Under Ky. St. § 2820, providing that the executive boards of cities of the first class and their officers shall not have power to bind the city to any extent beyond the amount of money at the time "already appropriated" by ordinance for the purpose of the department under the control of said board, a levy ordinance which, in subdividing the tax rate, designates a certain part of it "for

street repairs," constitutes an appropriation of that part of the tax rate for the purpose designated.

Indebtedness—Pleading.*—To invalidate a contract by a city on the ground that it creates an indebtedness in excess of the income and revenue provided for the year, in violation of Const. § 157, the facts showing that such is the effect of the contract must be alleged.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by George W. Gosnell against one Fehler and the city of Louisville. Judgment for plaintiff against the city of Louisville, and that defendant appeals. Affirmed.

H. L. Stone, for appellant.
Lane & Harrison, for appellees.

Du Relle, J. On a former appeal of this case, under the style of Fehler v. Gosnell, 99 Ky. 394, 35 S. W. 1125, the city of Louisville was not a party. After the return of the case the city was made a party, and judgment sought against it for 10 per cent. of the amount of the apportionment warrants sued on, as not being for original construction of streets, but for repairs. Upon a second appeal of the case, under the style of Gosnell v. City of Louisville, 46 S. W. 722, it was held that a cause of action was stated against the city upon that claim. After the second appeal the city filed its answer, to which a demurrer was sustained, and the correctness of that decision is now before us.

In the opinion upon the second appeal we held "* * * that the city has authority to contract with regard to street repairs, and, having so contracted, we cannot assume that it has done so to such an extent as to increase the tax rate beyond the limit provided in section 157 of the constitution, or beyond the appropriation and levy provided for and mentioned in the sections of the act for the government of cities of the first class, above referred to. On the contrary, we must assume that, in acting upon a subject with respect to which it had jurisdiction to act, it acted within the constitutional limitation, and within its revenue, as fixed and limited by the statute quoted. We see no reason why the city, if not exceeding the amount of its revenue which it is authorized to expend, may not expend its money for objects, the benefit of which it will receive in subsequent years." Upon the return of the case after the second appeal, counsel for the city, in a series of very skillfully drawn paragraphs, has attempted to plead around the opinion of the court. The justification of some of the defenses attempted to be set up rests upon what we consider a misconception of the word "appropriation," as

*See *note* to Thompson *v.* Town of Elton, *ante*, p. 721.

used in the statutes relied upon. For example, the first paragraph relies upon section 2820, Ky. St., providing that the executive boards and their officers shall not have power to bind the city "to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of the department under the control of said board"; and it is claimed that, as no specific amount had been appropriated by ordinance for the specific purpose of paying 10 per cent. of the contract price of the street improvements under consideration for five years' repairs of the improvement after its completion, this claim could not be paid at all, although under section 2981, providing for the levy ordinance, and for its subdivision for various purposes, it is distinctly provided that there shall be "a levy for street repairs." We are of opinion that the subdivision of the tax rate fixed by the levy ordinance is an appropriation of the tax levied for such purposes to the purposes designated in that ordinance, within the meaning of section 2820, and therefore that the averments of the paragraph do not constitute a defense under section 2820. So, in the third paragraph, appellant seems to be proceeding upon the theory that the subdivision of the levy was an appropriation for street repairs, and, therefore, having been appropriated for that purpose by the levy ordinance, there was no unexpended or unappropriated balance thereof which could, without violation of section 2982, be expended in payment for the street repairs here in question. The fourth paragraph is practically a plea that the court was in error in what it said upon the subject of these repairs in the former opinion. To be available, this matter should have been presented by petition for rehearing. The second paragraph, which undertakes to rely upon section 157 of the constitution, is, if we understand it correctly, a statement that the amount of the contract price under consideration, which has been held to be for repairs, viz. $577.07, makes the amount of indebtedness of the city for repairs of streets for that year exceed the total revenue and income of the city for that year by the amount of $577.07. We hardly think counsel intended to make such a statement, or the mayor to swear to it. But we are not of opinion that facts to show that this contract was in violation of section 157 of the constitution have been sufficiently pleaded in this paragraph. The judgment is therefore affirmed.

CITY OF CHICAGO *et al.*

v.

FISHBURN.

(*Supreme Court of Illinois, Feb. 20, 1901.*)

[59 N. E. Rep. 791.]

Constitutional Law—Municipalities—Limitation of Indebtedness.*—Const. art 9, § 12, prohibits a city from becoming indebted exceeding 5 per cent. of the value of its taxable property, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness. Section 1 provides that the value of taxable property shall be ascertained by persons chosen in such manner as the general assembly shall direct. The present statute requires the assessors to determine the fair cash value of property, and set down such value in a column headed "Full Value," and to set down one-fifth part thereof in another column, headed "Assessed Value," all taxes to be computed on the assessed value; but at the time the constitution was adopted the statute then in force required the assessment of property at its actual value, though as a matter of fact, and by a custom sanctioned by the courts and every department of the government, property was not assessed at its full value, and the full value was not set down, but only the assessed value. *Held*, that the requirement that the assessor shall set down the full value, and take a fixed share thereof as the assessed value, did not change the meaning of the constitution that the limit is to be determined by the assessed value, and hence the full value, as set down by the assessors, is not the criterion by which to determine whether a city has exceeded its limit of indebtedness.

Same—Same—Same—Assessed Valuation.—The statute requiring one-fifth of the actual value to be taken as the assessed value is not void, equality and uniformity between taxpayers being the dominant idea of the constitution, which nowhere prevents the legislature from fixing the assessed value at less than full value.

Appeal from superior court, Cook county; A. H. Chetlain, Judge.

Suit by Eugene H. Fishburn against the city of Chicago and others. From a decree for plaintiff, defendants appeal. Affirmed.

Charles M. Walker, Corp. Counsel, and Colin C. H. Fyffe, Asst. Corp. Counsel (Shope, Mathis & Barrett, of counsel), for appellants.

Isham, Lincoln & Beale (Wilson, Moore & McIlvaine, of counsel), for appellee.

*See *note* to Thompson *v.* Town of Elton, *ante*, p. 721.

Cartwright, J. Upon a bill of complaint filed by appellee, Eugene H. Fishburn, a taxpayer of the city of Chicago, the superior court of Cook county perpetually enjoined appellants, said city of Chicago, its mayor, comptroller, and clerk, from issuing bonds of said city to the amount of $686,000. The bonds were about to be issued under authority of two ordinances, set forth at length in the bill, for the purpose of building new bridges. No question was raised as to the form or passage of the ordinances, nor was it claimed that they were an improper exercise of municipal power if the city could incur the contemplated indebtedness for any purpose. The ground upon which the injunction was asked was that the city had reached and passed the constitutional and statutory limit of municipal indebtedness, and had no power to incur further indebtedness or issue additional bonds.

The evidence showed that the fair cash value of all the taxable property in the city for the year 1899, determined by the assessors and set down in the column headed "Full Value," as equalized by the county board of review and the state board of equalization, was $1,725,982,095, and one-fifth part thereof, ascertained by the assessors and set down in the column headed "Assessed Value," as so equalized was $345,196,419. The indebtedness of the city was $18,565,157.65, exclusive of $4,517,000 of bonds of the city issued in aid of the World's Columbian Exposition, and $3,250,000 of water certificates payable solely out of the net receipts of the city waterworks. The question upon which the decision of the case hinges is whether, in ascertaining the value of the taxable property of the city by the last assessment, the limit of indebtedness is to be based upon the full value as determined by the assessors, or upon the assessed value, which is one-fifth of the full value. Whether the obligations of the city in the form of bonds issued in aid of the World's Columbian Exposition should be included in the sum of existing indebtedness is immaterial, for the reason that the indebtedness of the city, exclusive of such bonds, and conceded by appellants, exceeds 5 per cent. of said assessed value, and if they are included, and the proposed issue of bonds added, the indebtedness will be very much less than 5 per cent. of the full value.

The eminent counsel for the respective parties have dwelt on the one side upon the necessities of the city and the insufficiency of its revenues to secure the public safety, convenience, and welfare, as requiring the proposed issue of bonds, and on the other side upon the terrors of the taxpayers, and the dread possibilities of municipal obligations and individual bankruptcy overhanging them, if the construction contended for by appellants should be adopted. If the city has power to issue the bonds, the question of issuing them, and building the proposed bridges, is a matter resting entirely within the discretion of its legislative body, with which we have nothing to do. If the city has no such power, the argument of con-

venience can only apply to the policy and wisdom of the limitation imposed by the constitution and statute, and cannot in any manner affect its validity. The errors assigned by appellants must be determined by deciding what the power of the city is, and that can only be done by construction of the constitutional and statutory provisions on the subject.

The provision of the constitution limiting the power of cities to incur indebtedness is found in section 12 of article 9, as follows: "No county, city, township, school district or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness. Any county, city, school district, or other municipal corporation, incurring any indebtedness as aforesaid, shall before, or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same." In paragraph 5 of section 1 of article 5 of the act for the incorporation of cities and villages, the legislature enacted in statutory form, in connection with the grant to municipalities of the power to borrow money, the same limitation and the provision for the collection of an annual tax, and in the same language as the constitution. This limitation in the constitution and statute is based upon a valuation to be ascertained by the assessment for taxation, and the constitution makes provision for taxes and assessment in section 1 of said article 9 as follows: "The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise." The statute for the assessment of property now in force provides that the assessors shall determine the fair cash value of property, and set down such value in a column to be headed "Full Value," and shall set down one-fifth part thereof in another column, to be headed "Assessed Value," and all taxes are to be apportioned, computed, and spread upon the assessed value so set down. If the value of the taxable property fixed as a basis for the limitation of indebtedness in the constitution is the value ascertained and set down for the purpose of apportioning and extending state and county taxes, then the decree was right; but if it means the full value, which the statute now requires to be set down in the other column, and to be determined by the assessor in the process of reaching the assessed value, then the city may lawfully issue the bonds.

In construing the provision of the constitution, the object to be attained is to ascertain and give effect to the intent of the people in adopting it, and this is to be done by ascertaining the sense of the words used. Hills v. City of Chicago, 60 Ill. 86; Cooley, Const. Lim. 55; 6 Am. & Eng. Enc. Law (2d Ed.) 921. The meaning of the term "assessment," in connection with taxation, is well understood. It is an official valuation of property for the purpose of fixing the proportion of taxes which each one shall pay. Judge Cooley, in his work on the Law of Taxation (page 258), defines it as follows: "An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district. As the word is more commonly employed, an assessment consists in the two processes of listing the persons, property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them." By our constitution, the assessment is a valuation to be determined according to the discretion of persons elected or appointed in such manner as the general assembly shall direct. It does not provide for a fixed or arbitrary standard of value, and we have constantly held that the valuation for the purpose of taxation is committed to the discretion of the assessor. It must be determined by him, and cannot be fixed by the legislature, which, however, are required by the constitution to enforce the provision that every person or corporation shall pay a tax in proportion to the value of his, her, or its property. The intent of the people was that revenue should be provided by levying a tax according to valuation, to be ascertained by some person or persons elected or appointed for that purpose, so that there should be uniformity and equality between the owners of property and the different subjects of taxation. The statute in force when the constitution was adopted required an assessment of property at its actual value, and the statute continued to so require up to the act of 1898, which is now in force; but it was common knowledge that under such statutes property was not assessed at its full value. In Board of Sup'rs of Bureau Co. v. Chicago, B. & Q. R. Co., 44 Ill. 229, and Chicago & N. W. Ry. Co. v. Board of Sup'rs of Boone Co., Id. 240, this court took notice of that practice as being long uniform, unchallenged, and recognized by the authorities having special charge of the revenue of the state. When the constitution was adopted no valuation of property in any assessment for state or county taxes had ever been made except the proportionate value fixed by the assessor, and none was made afterwards, up to 1898. The assessor had always adopted some proportionate basis of value, and, while it was necessary for him to determine the full value in order to take a certain proportion or share as the assessed value, he set down the assessed value only. The provision of the present statute is that he shall set down such full value in a column

prepared for that purpose, as a part of the process of determining the assessed value by a fixed proportion or part thereof. Under previous constitutions, the rule adopted by assessors to take some share of the real value of property as its value for taxation had grown into a custom sanctioned by every department of the government and recognized by this court, and, unquestionably, the provision in question referred to the value so fixed for the purposes of taxation. The meaning of the constitution does not change from time to time. The present law is in accord with the previous custom, but enforces uniformity by requiring the full value to be set down, and a fixed share to be taken. We do not think that the requirement that the assessors shall set down the full value and take a fixed share thereof as the assessed value can be held to change the meaning of the constitution that the limit is to be determined by the assessed value. We think the constitution means that the limit of municipal indebtedness shall be computed upon, and shall not exceed, 5 per cent. of the official estimate of the assessors for the preceding year as a basis for the apportionment of state and county taxes. That is the amount which is set down in the column under the head of "assessed value."

But it is urged by counsel for appellants that the word "value," used in the constitution, must mean actual value; that any attempt of the legislature to direct assessing officers to take one-fifth of such value as the assessed value is void; and that, inasmuch as the statute provides for a determination of such actual value, it must be held to be a basis of the limitation. The central and dominant idea of the constitution in the assessment of property for taxation and in the payment of taxes is uniformity and equality, but we find no provision which prevents the legislature from fixing the assessed value at less than full value. Justice and uniformity between taxpayers may be as well secured by a proportionate basis, and, while the value cannot be fixed by the legislature, it is within the legislative power to enforce the provision for uniformity by any proportionate rule. Assessors had always assessed property at a part only of the full value, and we see no reason why the legislature may not prevent the varying methods by which property was assessed unequally between different counties and municipalities of the state, by enforcing a fixed and uniform rule. So long as the correct proportion between the different subjects of taxation is maintained there is no language of the constitution which limits the legislative power to prescribe a basis for the action of the assessors.

We conclude that the limit imposed by the constitution, repeated in the act under which the city of Chicago is organized, prohibits the incurring of an indebtedness beyond 5 per cent. of the assessed value of the taxable property therein, and, as that limit has been reached and passed, the decree of the superior court was right. The decree is affirmed. Decree affirmed.

MAYFIELD WOOLEN MILLS *et al.*

v.

CITY OF MAYFIELD *et al.*

(*Court of Appeals of Kentucky, March 6, 1901.*)

[61 S. W. Rep. 43.]

Indebtedness—Debts for Future Services.*—A contract by a city with a water company for the payment of water rent, which was entered into prior to the adoption of the constitution, created an "indebtedness," within the meaning of Const. § 157, providing that the tax rate of cities having less than 10,000 inhabitants shall not exceed, for other than school purposes, 75 cents on the $100, "unless it should be necessary to enable such city * * * to pay the interest on, and provide a sinking fund for the extinction of, indebtedness contracted before the adoption of this constitution."

Same—Authority to Levy Tax.—The authority given the city to levy a tax to pay interest on, and provide a sinking fund for the extinction of, an indebtedness, authorizes the levy of a tax to pay installments of such indebtedness which, by the terms of the contract creating it, fall due from year to year.

Tax Levy by City Council—Necessity—Judicial Inquiry.—The courts cannot inquire as to the necessity of a tax levy made by a municipal council within the limits prescribed by the constitution.

Same—Intention as Rendering Void.—A tax levy, within the constitutional limit for the payment of current expenses, is not rendered void by reason of the fact that the intention is to pay it to parties with whom the city has a void contract for lighting the city.

Appeal from circuit court, Graves county.

"Not to be officially reported."

Action by the Mayfield Woolen Mills and others against the city of Mayfield and its tax collector to enjoin the collection of a tax. Judgment for defendants, and plaintiffs appeal. Affirmed.

Robertson & Thomas and Crossland & Webb, for appellants. D. G. Park and W. K. Wall, for appellees.

Du Relle, J. Appellants, taxpayers of the city of Mayfield, brought suit against the city and its tax collector, seeking to enjoin the collection of 25 cents of the tax rate of $1 on the $100 worth of taxable property, levied for the year 1900. By the averments of the petition, it appears that Mayfield is a city of the fourth class; that in all

Case Stated.

*See note at end of case.

the years since it became a city of the fourth class, until the year 1900, it levied a tax of only 75 cents on the $100; that the city had not created more indebtedness for the year 1900 than existed for any of the preceding years; and that the rate of taxation complained of was not for school purposes, nor necessary to enable the city to pay interest on indebtedness previously contracted, nor to provide a sinking fund for the extinguishment of indebtedness contracted before the adoption of the constitution. For the year 1900 the levy ordinance fixed the rate of taxation at $1 on each $100-worth of property, the ordinance providing that "seventy-five per cent. of such tax is levied for the purpose of paying the current expenses of the city of Mayfield for the year 1900, other than the water rent, and twenty-five per cent. of such tax is levied for the purpose of paying the Graves County Water & Light Company for rent of water for the year 1900, said debt for water having been contracted for, and being an existing indebtedness against said city, at and prior to the adoption of the present constitution of Kentucky." It was averred that the ordinance, to the extent of 25 per cent. of the taxes levied by it, was void, under section 157 of the constitution. A demurrer having been sustained to the petition, an amended petition was filed, averring that at the adoption of the present constitution, and continuously since that time, Mayfield has been a city of more than 3,000, and less than 8,000, inhabitants; that it was made a fourth-class city by the act of the general assembly approved September 30, 1892, and that the act for the government of cities of the fourth class became a law June 28, 1893; that under subsection 2, § 3490, Ky. St., being part of the act for the government of cities of the fourth class, the city has power to levy an ad valorem tax of 75 cents only on the $100 worth of property, and in addition not exceeding 50 cents on the $100 worth of property, for the maintenance of schools, and not exceeding 50 cents to meet the principal and interest of any bonded debt thereinafter authorized, such bonded debt referred to being the bonded debt authorized to be incurred by a vote of the people; that the indebtedness sought to be met by the taxes complained of was not created by a vote of the people, nor were such taxes for school purposes, or for the erection or improvement of any public school building or buildings, nor levied under the provisions of any law existing prior to the adoption of the present constitution, nor was such "indebtedness contracted under any law providing for any levying or collecting any taxes" by the city. It was further alleged that the boundary of the city has not been changed; that there are no more streets to be kept in repair, and no more necessity for an increase of the current expenses, than had existed continuously since the adoption of the constitution, and that all the current expenses of the city, and the indebtedness for which the tax complained of was levied, had been paid in prior years with the levy of only

75 cents on the $100 worth of property; and that the assessed valuation of the property in the city had continuously increased during that period, and that the increased rate of 25 cents was not necessary to enable the city to pay that indebtedness. It was further alleged that, without any vote of the people, the city had increased its annual indebtedness in the sum of $8,581, the averments showing that this increase of annual indebtedness was an increase of expenses caused by increasing the number of policemen, the number of street lights, for brick streets, etc., and that the city had no right to contract such increased indebtedness, or any indebtedness which, added to the existing one, would necessitate the 25 per cent. increase of the tax rate. In an additional paragraph it was alleged that in 1893 the city entered into a contract with the Graves County Water & Light Company, in which it agreed to pay the company the sum of $1,660 per year for 10 years thereafter to furnish electric lights for the city, and that by that contract it became indebted to the Graves County Water & Light Company in the sum of $16,600; that only two years of its contract with that company for water hydrants had then expired, and it was liable on that contract for 23 years, at $3,840 per year, or a total sum of $88,320; that the assessed value of the taxable property of the city for the year preceding the year the additional contract for lights was made was $1,200,000, and that the existing indebtedness for water hydrants exceeded 5 per cent. of the assessed value of the taxable property of the city, and therefore the contract for the electric lights was in violation of section 158 of the constitution; that 16 cents of each dollar of the tax levied was levied for the purpose of paving what was due on the contract for said lights for the year 1900, and that the levy was void to that extent. A demurrer to the petition as amended was sustained, and, the plaintiff declining to plead further, the petition was dismissed.

Indebtedness—Debts for Future Services.

A number of questions are made as to misjoinder of plaintiffs, departure in the amended petition, and upon motions to strike out parts of the pleadings; but, in the view we have taken of the law of the case, it is not necessary to determine any of these.

By section 157 of the constitution, which is relied on in the original petition, it is provided that the tax rate of cities having less than 10,000 inhabitants shall not exceed, for other than school purposes, 75 cents on the $100, "unless it should be necessary to enable such city * * * to pay the interest on, and provide a sinking fund for the extinction of, indebtedness contracted before the adoption of this constitution." The contention, therefore, upon the original petition, is that, admitting the contract for water hydrants to be an indebtedness existing at the time the constitution was adopted, nevertheless, because a tax rate

Same—Authority to Levy Tax.

of 75 cents had, for a number of years after the adoption of the constitution, been sufficient, not only to pay the current expenses of the city, but also to provide for the current installment due under that contract, such current expenses should never be increased so as to require a tax levy in addition to the 75-cent rate to meet such liability existing at the time of the adoption of the constitution, or, at least, that such expenses should not be so increased unless there existed a necessity for the increase, and that the courts must determine the existence of the necessity.

It is nowhere averred that the contract with the water company for water rent had not been entered into prior to the adoption of the present constitution, though some of the averments of the amended petition seem framed with the intention of approaching such an averment, and the existence of the facts relied upon to make the tax illegal should appear clearly by the averments. Indeed, appellants' brief seems to concede the existence of this contract, and it is practically conceded by the recital in the amended petition averring the length of time it had to run when the additional contract for lights was entered into. That the contract thus existing at the date of the adoption of the constitution was an indebtedness, within the meaning of section 157, seems to be settled beyond all question by the case of Beard v. City of Hopkinsville, 95 Ky. 239, 24 S. W. 872, 23 L. R. A. 402. It follows, therefore, that unless the courts can inquire into the necessity of a tax levy made by the municipal legislature within the limits prescribed by the constitution, this objection cannot be sustained. It seems to be well settled that such inquiry cannot be made. "The tax in question was authorized by the city charter, and in such case whether its imposition be necessary is a matter for the determination of the taxing power." Anderson v. City of Mayfield, 93 Ky. 234, 19 S. W. 598.

Tax Levy By City Council—Necessity—Judicial Inquiry.

The 25-cent levy is also objected to upon the ground that the provision of section 157, above quoted, provides only for the levy of a tax to pay the interest on, or to provide a sinking fund for the extinction of, such pre-existing indebtedness, and does not authorize a levy to pay the debt directly. Subsection 26, § 3490, Ky. St., was adopted by virtue of section 157. It provides that nothing in the act "shall be construed to prevent any city having an indebtedness contracted under laws existing at the date of the adoption of the present constitution of Kentucky from levying and collecting such taxes for the payment of such indebtedness, and the interest thereon, as are provided for in such laws, in addition to the tax herein authorized to be levied and collected." This indebtedness was not only contracted in accordance with laws in existence at the date of the constitution, of which we take judicial notice, but was itself contracted before the adoption of that instrument. That contract could not be affected or invalidated

by the adoption of the constitution. See Freeman's note to Beard v. City of Hopkinsville (Ky.) 44 Am. St. Rep. 241 (s. c. 24 S. W. 872, 23 L. R. A. 402).

Nor are we able to see the force of the contention that the express exception authorizing the city to levy a tax to pay interest on, and provide a sinking fund for the extinction of, an indebtedness does not include in its terms authority to levy such a tax to pay installments of such indebtedness, which, by the terms of the contract creating it, fall due from year to year. In construing section 158 of the constitution, this court, through Judge Hazelrigg, in Holzhauer v. City of Newport, 94 Ky. 405, 22 S. W. 754, said: "But in express terms the limitation of ten per centum may be exceeded when the proposed indebtedness 'has been authorized under laws in force prior to the adoption of this constitution.' There is no limit indicated to this excess. From the very nature of the case, there could be none. At least the actual condition of the cities and towns, with respect to the sums they owed, could not be affected by the constitution. These debts, however large, and by whatsoever extent they might in fact exceed the conservative limit imposed under the constitution, could not be legislated out of existence."

When we come to consider the amendment, we find the basis of the contention to a large extent changed. Waiving the question of departure, we find it contended that because the aggregate amount of the annual payments to be made under the water contract during the whole period of the contract will be $88,320, and the indebtedness provided for by the contract for lights would amount to $16,600, the tax levy of 16 cents for rent of lights provided for by the levy ordinance set out in full in the petition is invalid, under section 158 of the constitution, because the aggregate indebtedness, under both the contracts referred to, is more than 5 per cent. of the total of taxable property in the year 1892, which was the year before the second contract alleged was entered into. We must read these averments of the amended petition in connection with the provisions of the ordinance set out in the original petition, for the averments themselves show that they are made with reference to those provisions. The ordinance does not show that the levy of 16 cents is to pay a pre-existing indebtedness; but, on the contrary, that it is to pay a part of the current running expenses of the city for that year, and to that extent limits and controls the averments of the amended petition. Whether the 16-cent levy is in fact to be paid in compliance with such a contract as the one alleged in the amendment becomes immaterial, for the same pleading admits that this very levy is to pay a part of the current expenses for that year. Being for current expenses, and within the constitutional limitation for that purpose, it makes no difference whether it is intended to pay it to the parties with whom the city has a void contract or not. The only ques-

tion is whether it is a necessary or proper current expense, and that question is to be settled by the municipal council, which alone has the jurisdiction to decide it. We are not deciding that in proper proceeding the contract complained of may not be declared void or its execution enjoined. But if in such proceeding such judicial action were already taken, it would still be necessary to run the city; the city government would still live for that purpose, and would still have power to make a levy of 16 cents on the $100 to provide for city lights. Nicholasville Water Co. v. Board of Councilmen (Ky.) 36 S. W. 549. Whether the contract is void or not is not now the question. The question here is solely as to the powers of the municipality to levy a tax for current expenses within its constitutional limitation. "In all legal proceedings, after proper evidence is given of municipal action, it is always to be assumed that the municipality, whether represented by its people or by its official board, has acted wisely and well upon all matters of policy and of discretion which have been submitted to it, and that the conclusion was warranted by the facts and circumstances which were the basis of its action. The courts have no power to review their action so long as they are found to have kept within the limits of their authority. The legislature, which gives and recalls, at pleasure, the power to tax, may do so, but not the courts." Cooley, Tax'n (2d Ed.) 342. For the reasons given, the judgment is affirmed.

Same—Intention as Rendering Void.

NOTE.

Indebtedness—Debts for Future Services.—The main point decided in the principal case is embodied in the following sentence "that the contract thus existing at the date of the adoption of the constitution was an indebtedness, within the meaning of sec. 157, seems to be settled beyond all question by the case of Beard *v.* City of Hopkinsville, 95 Ky. 239, 24 S. W. 872, 23 L. R. A. 402." The court, in the case thus cited as settling the question involved, was construing sec. 158 of the Kentucky constitution and not sec. 157, so that the principal case virtually decides that the term "indebtedness" as used in sections 157 and 158 of the Kentucky constitution are synonymous. Upon the question as to whether the term "indebtedness" as used in sec. 158 placing a constitutional limitation upon municipal indebtedness embraces debts for future services, see *note* to Thompson *v.* Town of Elton, *ante*, p. 721.

STEGE

v.

CITY OF MILWAUKEE.

(*Supreme Court of Wisconsin, May 21, 1901.*)

[86 N. W. Rep. 161.]

Defective Sidewalks—Injuries.*—Where a coal hole in the sidewalk had been propped partly open for several months to ventilate the space beneath, and plaintiff was injured by falling into it, the evidence was sufficient to support a verdict finding the city guilty of negligence.

Same—Same—Contributory Negligence.—Where the lumber with which plaintiff was to repair the steps of a house was piled in the gutter, and plaintiff, before working an hour, and while walking backward in order to swing a long piece of timber around, was injured by falling into a coal hole in the sidewalk, the fact that he was walking backward did not render him guilty of contributory negligence as a matter of law.

Same—Same—Same.—Where plaintiff, while engaged in carrying lumber across the sidewalk to repair the adjoining building, was injured by falling into a coal hole in the sidewalk, he was not guilty of contributory negligence, as a matter of law, in failing to see that the coal hole was partly open.

Appeal from superior court, Milwaukee County; J. C. Ludwig, Judge.

Action by Herman Stege against the city of Milwaukee. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is an action to recover for personal injuries suffered by the plaintiff on an alleged defective sidewalk. The evidence showed that on the 19th of September, 1895, the plaintiff, who was a carpenter, was engaged in repairing the front steps of a certain house on the east side of Seventh street, in the city of Milwaukee; that Seventh street runs north and south, and has upon its east side a sidewalk 10 or 12 feet in width, with a space 3 feet or more in width between the outer edge of the sidewalk and the curbstone, in which space there stand a row of trees and a hitching post; that the lumber with which the plaintiff was to work was deposited in the gutter in front of the house to be repaired; that in the sidewalk in front of the said house, and about a foot or more from the outer edge thereof, there was a hexagonal coal hole, with a removable iron cover, for the purpose of giving access to the excavation underneath the sidewalk; that the plaintiff had

*See *note*, 1 Mun. Corp. Cas., p. 58.

been at work half an hour or more upon the steps, and went across the sidewalk to the gutter to get some lumber; that he took up a piece of 2x4 scantling, 16 feet in length, by one end, and, swinging the other end around, he stepped backward a few steps, dragging the piece after him, and while so engaged stepped on the cover of the coal hole, which tipped up, causing him to fall down in the hole astride of the cover, and seriously injuring him. The plaintiff testified that he had no notice that the cover was misplaced. The testimony of other witnesses showed without dispute that during all pleasant days during the preceding summer the cover in question had been propped up by a small stick on one side for the purpose of ventilating the excavation underneath, and that it had been open in that way upon the morning previous to the accident. There was no testimony tending to show that the cover, or the ring in which it was fitted, was in any way defective. A special verdict was rendered by the jury as follows: "(1) Was the plaintiff injured on September 19, 1895, by falling into a cellar hole in the sidewalk in front of the building known as 'No. 124 Seventh Street,' in the city of Milwaukee? Answer by Court. Yes. (2) Had the occupant of said building, on September 19, 1895, and prior to the accident, opened said hole by lifting the cover on one side, and propping it up? Answer by Court. Yes. (3) Did such propping up of such cover on said day cause or constitute such a defect in said sidewalk as to make the use of said sidewalk dangerous for travelers on foot when exercising ordinary care in passing over the sidewalk? Answer. Yes. (4) Was the cover, as it was propped up, liable to fall in such a position that it would cause or constitute such a defect in said sidewalk as to make the use of said sidewalk dangerous for travelers on foot using ordinary care? Answer. Yes. (5) If you answer the fourth question 'Yes,' would a person of ordinary care and prudence have reasonably expected that the cover, when so propped up, was liable to fall in such a manner that it would constitute such defect in said sidewalk? Answer. Yes. (6) Was the cover in the same position at the time of the accident that it was placed in by the occupant of the building on the day of the accident? Answer. Yes. (7) If you answer the sixth question 'No,' had the cover fallen after it had been propped up by the occupant, and before the accident? Answer. No. (8) Did the position of the cover at the time of the accident constitute such a defect in said sidewalk as to make the use of said sidewalk dangerous for travelers on foot using ordinary care? Answer. Yes. (9) If you answer the eighth question 'Yes,' was such defect the proximate cause of the injury? Answer. Yes. (10) Had the occupant of the building, for several months prior to the accident, almost daily, when the weather was pleasant, opened said hole in the same manner as he did on the day of the accident? Answer by Court. Yes. (11) Ought the defendant city, in the exercise of ordinary care, to have known of

the repeated propping up of the cover in such position long enough prior to the accident to have avoided the injury? Answer. Yes. (12) Was the plaintiff guilty of a want of ordinary care which proximately contributed to the injury? Answer. No. (13) If the court should find the plaintiff entitled to judgment, at what sum do you assess his damages? Answer. Eleven hundred dollars." Upon this verdict judgment was entered for the plaintiff, and the defendant appeals.

Carl Runge and Joseph B. Doe. Asst. City Atty., for appellant.

Somers & Somers, for respondent.

Winslow, J. (after stating the facts). The evidence in this case certainly tends to show that the cover of the coal hole in question had been partially opened and left open nearly every day for several months prior to the plaintiff's injury, and that when so opened it was a serious defect in the sidewalk. Covered coal holes and hatchways may lawfully exist in a sidewalk, but, if they are negligently left open for such length of time that the city authorities ought, in the exercise of reasonable diligence, to know and remedy the mischief, the city may become liable for injuries occasioned thereby to travelers exercising ordinary care. Whitty v. City of Oshkosh, 106 Wis. 87, 81 N. W. 992. That the plaintiff was, in the legal sense, a traveler upon the sidewalk, is not open to reasonable doubt. Though not walking longitudinally along the sidewalk, he was rightfully using it for a lawful and necessary purpose, and was plainly entitled to the protection of the law concerning defective highways. There was absolutely no evidence to show that the cover was in any way defective, or liable to slip, when properly in position, but there was ample evidence that upon the day of the accident it had been propped open a few inches, and left in that condition until the plaintiff stepped upon it. It is said that plaintiff was guilty of contributory negligence, as matter of law, in walking backward, and in not seeing the condition of the cover. Neither of these contentions can be sustained. It is doubtless true that if a man, without cause therefor, were to walk along the street backward, or with his eyes shut, for any considerable distance, and should fall into a hole, he would be chargeable with contributory negligence; but that is not this case. The plaintiff here was simply using a very ordinary and usual method of swinging the end of the long scantling which he was carrying around the tree so that he might take it to the steps which he was repairing, and in so doing he stepped backward a few steps. It was clearly for the jury to say whether his action was consistent with ordinary care under the circumstances. Nor can it be said that he was negligent, as matter of law, because he had not seen the condition of the cover. He had been at work less than an hour, and his work had been upon the steps of the building upon the other side of the sidewalk.

He was evidently busily engaged, and giving his entire attention to his job. Under such circumstances it cannot be said as matter of law that he was negligent in not seeing that the cover was propped up. This was also a question for the jury. Cantwell v. City of Appleton, 71 Wis. 463, 37 N. W. 813. The verdict was based upon sufficient evidence, and it plainly sustains the judgment. There are no other questions which require decision. Judgment affirmed.

PHALEN

v.

CITY OF DETROIT.

(*Supreme Court of Michigan, May 21, 1901.*)

[86 N. W. Rep. 126.]

Pleading—Amendment.—Where a declaration fails to allege that a notice, required by the charter of a city, was served upon the city, it is competent to permit an amendment to the declaration alleging that fact. It is not an introduction of a new cause of action.

Defective Sidewalks—Liability of City.*—Where the statute requires municipalities to keep their sidewalks in reasonable repair, and in condition reasonably safe and fit for travel, it is error to instruct the jury that the municipality is required to keep its sidewalks in good repair, and safe and convenient for public travel.

Error to circuit court, Wayne county; Joseph W. Donovan, Judge.

Action by Christiannah Phalen against the city of Detroit. Judgment for plaintiff. Defendant brings error. Reversed.

P. J. M. Hally and Chas. E. Love (Timothy E. Tarsney, of counsel), for appellant.

Lewis A. Stoneman (Arthur Webster, of counsel), for appellee.

Grant, J. Plaintiff recovered a verdict and judgment for injuries resulting from a fall upon a defective sidewalk. The declaration did not allege the notice served upon the law department of the city, as the charter requires. When proof of the service of notice was tendered, counsel for defendant objected because it was not alleged in the declaration. Careful pleading would require the allegation in a declaration that the notice required by the charter, and the failure to give which is made a complete defense to the suit, was given. Whether it is absolutely essential we need not determine.

*See *note*, 1 Mun. Corp. Cas., p. 58.

The court ordered an amendment to the declaration, and the trial evidently proceeded upon the theory that the amendment was made. This was within the power of the court, and did not introduce a new cause of action.

2. The court instructed the jury: "The plaintiff claims to have been injured while walking on a sidewalk in the city of Detroit. Under the law in this state, it is necessary that the defendant (that is, the city) should keep its sidewalks in good repair, so that they shall be safe and convenient for public travel at all times; and if the defendant fails to keep its sidewalks in good repair, and on account of that negligence an injury happened, then the city would be liable to the person so injured, provided the city had notice of the defective condition." This instruction was taken substantially from the law as it existed under Act No. 244 (Pub. Acts 1879, § 4). The law was subsequently amended, and now requires that townships, etc., shall keep their sidewalks, etc., in reasonable repair, and in condition reasonably safe and fit for travel. The instruction would undoubtedly have been proper under the former law, but was not under the present law. The legislature, in changing the law, evidently recognized that there was a distinction betweeen "good repair" and "reasonable repair," and between a "condition safe and fit for travel" and one "reasonably safe and fit for travel." Reversed, and new trial ordered. The other justices concurred.

BURROUGHS

v.

CITY OF MILWAUKEE.

(*Supreme Court of Wisconsin, May 21, 1901.*)

[86 N. W. Rep. 159.]

Defects in Street—Evidence.*—Where, in an action for injuries received by stepping into a depression in the street on alighting from a street car at a crossing which was much used, the undisputed evidence showed that the depression into which plaintiff stepped was not more than an inch and a half deep at any place, it did not constitute an actionable defect for which the city was liable.

Appeal from superior court, Milwaukee county; Orren T. Williams, Judge.

Action by Sarah Burroughs against the city of Milwaukee. Judgment for plaintiff. Defendant appeals. Reversed.

Carl Runge and Jos. B. Doe, Asst. City Atty., for appellant. Quarles, Spence & Quarles, for respondent.

*See *note*, 1 Mun. Corp. Cas., p. 58.

Burroughs *v.* City of Milwaukee

Cassoday, C. J. This is an action to recover damages for personal injuries sustained by the plaintiff upon stepping from a street car on which she was riding westerly on Grand avenue after the car had stopped immediately west of the intersection of the west line of West Water street and Grand avenue, by reason of an alleged defect in the asphalt pavement. Issue being joined, and trial had, the jury returned a special verdict to the effect: (1) That the plaintiff was injured July 13, 1898, by falling near the northwest corner of the intersection of Grand avenue and West Water street, in the city of Milwaukee; (2) that there was at the time when and the place where the plaintiff was injured such a defect in the asphalt pavement as rendered it unsafe or dangerous for persons alighting from street cars when in the exercise of ordinary care; (3) that the condition of the pavement was, at the time and place of the accident, such that the defendant city, acting through its officers and agents having charge of its streets, in the exercise of ordinary care and prudence, ought to have known that such an accident as happened to the plaintiff might probably occur to persons using such street when in the exercise of ordinary care; (4) that such defective and unsafe condition of the pavement at the time and place of the plaintiff's injury was the proximate cause thereof; (5) that the plaintiff was not, at the time and place of the injury, guilty of a want of ordinary care which contributed to her injury; (6) that the plaintiff's left leg and ankle had not been previously weakened or injured so that it directly contributed to her injury on the occasion in question; (7) that they assessed the plaintiff's damages at $3,000. Thereupon, and in pursuance of an order of the court, judgment was entered in favor of the plaintiff for the amount mentioned, with costs. From that judgment the defendant brings this appeal.

It is conceded that when the car stopped at the time and place mentioned the plaintiff, who was 43 years of age, and a widow, left her seat, which was crosswise the open car, and about the middle thereof, and took hold of the post in front of her on the north side of the car with her left hand, and stepped down upon the step eight inches wide, and extending the whole length of the car; and then, after looking both ways to see if any teams were coming, she stepped down into a depression in the pavement, and her foot bent under her, and she fell, and seriously and permanently injured her. There were two street-railway tracks on Grand avenue, and the car in question was on the north track. It stopped at the usual and customary place for the stopping of all cars proceeding in a westerly direction. The intersection of those two streets was one of the principal business centers of the city, and was in constant use by large numbers of people traveling on foot and in vehicles. The principal question presented is whether it was error to refuse a nonsuit or to direct a verdict in favor of the defendant; in other words, was the alleged defect in

the pavement such as to authorize a recc
The answer to the question necessarily de
dence. Seven witnesses were sworn and e
of the plaintiff in respect to the dimens
depression complained of. The first one t
that at the time of the accident the hole
a half to two feet north of the north rai
blocks had sunk from a half to an inch
pavement; that the hole was scooped out
the granite blocks towards the rail, betwee
and the north rail of the track, from four tc
and a foot and a half in length, and an in
a half deep; that next to the granite blo
down, and from the asphalt it was sloping
depression was on the north side of the
plaintiff's other witnesses give similar d
in the length given from 10 to 30 inches,
6 to 10 inches, and the depth from 1 inch
them giving as the greatest depth 1½ inch
they give as the greatest depth 2½ inch
witnesses made any measurement, but me
length, breadth, and depth as they remen
testimony of the other witnesses on the
will be considered later. It appears from
witness on the part of the defendant, and
he repaired the water pipe in front of Blc
on Grand avenue May 28, 1898; that he cu
a square; that he filled up the hole, ta
put in about seven or eight granite blocks
inches long, some being a foot, and some
to break joints; that they were 6, 7, or 8
made to fit in unequal surfaces; that he c
or 20 inches one way and about the same
he filled it up as good as he could with
and tamped it down until it was solid, and
granite blocks to get them even with the
man of the city, stationed near where the
saw the plaintiff just after the accident, a
effect that he measured the hole or depr
day; that he took a straight edge, and laic
and by measuring with the straight edge
southwest it measured an inch and a qu
part, but that with the straight edge lyi
measured an inch and a half at the deepest
was sort of oval shape; that the asphalt
actly level at that place; that, holding the
one way, the end of it might be a little hig
than holding it another way, and, so to ge
he measured it in different ways; that th
inches east and west (lengthwise), and 13
and south); that the south edge of the d

and 5 inches from the north rail of the street car track. Another of the defendant's witnesses testified that he measured it with a rule he carried in his pocket; that it was 18 inches long from east to west; that the width from the cobble stones to the asphalt, undisturbed, was 13 inches; that the deepest part near the granite blocks was an inch and a half; that there was no perpendicular fall at the south edge; that it was "topped" off by the teams about half an inch; that the bottom of the depression sloped from the south to the north, so that the deepest point was an inch and a half from the level pavement; the slope began half an inch below the level of the pavement; that he got the measure down, and drew a line; and that he thinks he made such measurement July 28, 1898. Another of the defendant's witnesses testified to the effect that the accident happened nearly in front of his store; that there was a depression in the asphalt pavement at that place at the time; that he should judge it was about 18 inches long and 12 inches wide, and from an inch to an inch and a half deep, but that he did not pretend to swear exactly to that depth. Thus it appears that seven witnesses substantially agree as to the depth of the depression, two of them fixing it by actual measurement, and five of them by estimate; four of them being witnesses of the plaintiff. Two other witnesses of the plaintiff substantially agree with such measurement, except that in their estimates they put it about an inch deeper than such measurement. But the witness Meyers, in behalf of the plaintiff, who testified to the effect that he did business at the time of the accident on Grand avenue, three stores west of West Water street; that he heard of the accident three or four days after it occurred; that he did not examine the place of the accident any more than stopping there, waiting for a street car, on his way home; that he noticed it, ever since the street was torn up, several times a day; that he noticed that rut up to the time it was filled in and repaired, the spring before the accident, in the same place, as a part of a prior excavation; that the rut was about 4 or 5 feet long, and about 3 feet wide, and probably 3 or 4 inches sloped down, worn off from vehicles passing over it, a little more in one place than in another; the deepest part was probably 5 or 6 inches; that he made no measurements of that depression; that on the day of the accident the rut was 6 or 7 feet north of the north railroad track. The rut thus mentioned is obviously not the one the plaintiff stepped into, for she testified that with the left hand upon the post of the car she stepped down upon the step of the car, and from there she stepped down upon the pavement, her foot coming into a hole, and she fell. As indicated above, the plaintiff's first witness on the subject testified that the hole into which she stepped "was from a foot and a half to two feet north of the north rail"; and that corresponds with the measurement made. The charitable view of the testimony of the witness

Meyers is that in testifying as he did, nearly two years after the accident, he had reference to the rut as he remembered it at the time the repairs were made in the spring before the accident. Certainly, no substantial reliance can be placed upon his estimate as to the depth of the depression, as against the actual measurement of two witnesses, corroborated by the estimates of seven others. We must hold that it is established by undisputed evidence that the depression was not more than an inch and a half deep at any place. That being so, must we not hold, as a matter of law, that there was no actionable defect in the street? The only serious doubt we have had upon that question is as to whether the city should not be held to a stricter responsibility by reason of the multitude of people constantly getting on and off the cars at that point. But, after careful consideration, we are constrained to hold that there is no credible evidence of any actionable defect in the street at the time and place in question. The facts bring the case squarely within the ruling of this court in a recent case. Kleiner v. City of Madison, 104 Wis. 339, 80 N. W. 453. In that case the ends of the boards constituting the apron were sawed off square, and elevated just a trifle less than two inches, and it was held not to constitute an actionable defect in the sidewalk. We are not aware of any well-considered case in this court requiring the case at bar to be submitted to a jury. The judgment of the superior court of Milwaukee county is reversed, and the cause is remanded for a new trial.

CITY OF HENDERSON

v.

REED.

(*Court of Appeals of Kentucky, May 21, 1901.*)

[62 S. W. Rep. 1039.]

Injury from Defective Street.*—Defendant city was liable for an injury to plaintiff from the passing of his foot through a hole in a grating forming part of a sidewalk, if the hole made the sidewalk unsafe for public use, and the city knew that fact, or could by the exercise of ordinary diligence have known it, and plaintiff was exercising ordinary care in the ordinary use of the sidewalk.

Failure to Instruct as to Contributory Negligence.—Defendant cannot complain of the court's failure to give an instruction as to contributory negligence, where the instruction on that point asked by it was objectionable in form, and there was, besides, no evidence that plaintiff knew of the defect in the street, and the court instructed the jury that plaintiff could not recover unless he was exercising ordinary care.

*See *note*, 1 Mun. Corp. Cas., p. 58.

City of Henderson *v.* Reed

Appeal from circuit court, Henderson county.

"Not to be officially reported."

Action by L. T. Reed, by next friend, against the city of Henderson, to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Clay & Clay, for appellant.
J. F. Lockett and J. S. Powell, for appellee.

O'Rear, J. Appellee, L. T. Reed, aged about 14 years, was injured by partially falling through the grating on a sidewalk in appellant city, and sued for consequent damages. The defect complained of was a broken bar in a grating which formed a part of the sidewalk, and being next to the line of buildings abutting on the street. The broken bar left a hole from 2½ to 3 inches wide. Appellee's foot passed through this hole, precipitating the weight of his body upon the leg, resulting in a cut to the bone and severing one of the tendons. The case had two trials before juries, resulting each time in a verdict for appellee in the sum of $250. The only grounds alleged as error by appellant city are: (1) That the verdict was not sustained by the evidence; and (2) that the court misinstructed the jury.

Upon the first ground numerous witnesses testified as to the size of the hole in the grating, and the length of time it had existed; it having been there for the better part of three years. That appellee fell through the hole without knowing of its existence, and sustained the injury complained of, is not in controversy. There was sufficient evidence to justify the submission of the case to the jury, and to sustain their verdict.

The court instructed the jury as follows: "(1) It was the duty of the city of Henderson to keep its streets in a reasonably safe condition for public use, and if you believe from the evidence that the hole in the grate complained of made it unsafe for public use, and the city knew that fact, or could by the exercise of ordinary diligence have known it, and that plaintiff, in the ordinary use of said sidewalk, and in the exercise of ordinary care, was injured by stepping into the hole complained of, you will find for the plaintiff an amount in damages that will compensate him for the injury sustained, not to exceed the sum of $1,000.00; and, if you find for the plaintiff, the criterion of his recovery will be the physical and mental suffering endured and the loss of time from his labors. (2) If you believe from the evidence that the sidewalk at the point complained of was not in an unsafe condition for public use at the time plaintiff received the injury, you will find for the defendant; or if it was in an unsafe condition, and the city did not know that fact, or could not have ascertained it by the exercise of ordinary care, you will find for the defendant." These instructions, we think, fairly presented the case to the jury, submitting to them the question whether the hole

complained of made the sidewalk unsafe for public use, and whether the city knew that fact, or could by the exercise of ordinary diligence have known it, and whether the plaintiff in the ordinary use of the sidewalk, in the exercise of ordinary care, was injured by stepping into the hole complained of. It is complained that an instruction submitting plaintiff's contributory negligence was not given. The one asked for by appellant on this point was objectionable in form, and properly rejected. Furthermore, there was no evidence that plaintiff knew of the defect, and the evidence on the whole shows, and that question, too, was submitted to the jury in the first instruction, that plaintiff was at the time of the injury using the sidewalk, exercising ordinary care. We think the instructions given were sufficient to cover the facts shown in this case. The judgment is therefore affirmed, with damages.

TIMES PRINTING CO.

v.

CITY OF SEATTLE *et al.*

(*Supreme Court of Washington, May 7, 1901.*)

[64 Pac. Rep. 940.]

Statement of Facts—Service.—2 Ballinger's Ann. Codes & St. § 4889, provides that the service of a statement of facts may be personal or by delivery to the party's attorney, or it may be made during the attorney's absence from his office, by leaving the papers with his clerk therein, or with the person having charge thereof. A copy of a statement of facts was delivered to a clerk in the office of plaintiff's attorney when the attorney was present in the office. *Held*, that a motion to strike the statement of facts from the files must be granted, since it is only when the attorney is absent from the office that a copy may be left with the clerk.

Pleading—Practice—Sufficiency of Assignment.—Where plaintiff filed a supplemental complaint after a demurrer had been sustained to the original, an assignment that the court erred in admitting any evidence at the trial was sufficient to raise the question whether the supplemental complaint stated a cause of action, though no demurrer was filed to it.

City Printing—Award.—Allegations that a city charter provided that bids should be submitted for the city printing, and that the city council should accept the lowest proposal, and appoint the bidder city printer; and that plaintiff filed a bid to do the city printing for 21 cents per inch for the first insertion, and 20 cents per inch for each subsequent insertion; and that plaintiff's competitor bid 35 cents per inch for the first insertion, and 30 cents per inch for subsequent insertions, measure to be by nonpareil type, matter set solid; and that the city council appointed

Times Printing Co. *v.* City of Seattle

plaintiff's competitor city printer on the ground that plaintiff's bid was ambiguous; and that there was a general custom that printing was to be measured by nonpareil type set solid, and that plaintiff's bid was made with reference thereto; and that the city council maliciously and fraudulently accepted the bid of plaintiff's competitor with the intention to defraud plaintiff,—stated facts sufficient to constitute a cause of action.

Appeal from superior court, King county; O. Jacobs, Judge.

Action by the Times Printing Company against the city of Seattle and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Stratton & Powell, for appellants.
Bausman, Kelleher & Emory, for respondent.

Per Curiam. The respondent, the Times Printing Company, brought this action against the Post-Intelligencer Publishing Company, the city of Seattle, and the city councilmen thereof, and prayed for an injunction prohibiting the publication of the city printing in the Post-Intelligencer, a newspaper published by the Post-Intelligencer Publishing Company, and for a mandatory injunction compelling the city authorities to award the city printing to the respondent, and to recognize respondent's paper as the city official newspaper for the year 1899. In the month of November, 1898, bids for the city printing of the city of Seattle for the year 1899 were regularly submitted in pursuance of a published notice calling for such bids. The bid of the Times Printing Company states the following terms, to wit: "For each first insertion, twenty-one cents per inch. For each subsequent insertion, twenty cents per inch." The bid of the Post-Intelligencer Publishing Company states the following terms, to wit: "For the first insertion, per inch, 35 cents. For each subsequent insertion, per inch, 30 cents. Measurement to be by nonpareil type, and matter set solid." The complaint shows that the charter of the city of Seattle provides that, when bids for the city printing have been submitted and opened, "thereupon the council shall, by resolution, announce the names of all parties whose proposals have been offered, and the terms of their proposals, respectively, and designate as city official newspaper that newspaper whose manager or owner has offered the lowest proposals," etc. Upon opening the aforesaid bids, the city council, by resolution, declared the bid of the Post-Intelligencer Publishing Company to be the lowest one, and designated the Post-Intelligencer as the city official newspaper for the year 1899. This action of the council was based upon the fact that the bid of the Times Printing Company did not designate the method of measurement or the kind of type with which it proposed to do the printing, whereas that of the Post-Intelligencer Publishing Company specified, "Measurement to be by nonpareil type, and matter set solid." From this the council determined that the bid of

the Times Printing Company was indefinite, and that the other was the lower bid. The complaint contains the following among other averments: "That under a general custom and usage well known throughout the United States, and the state of Washington, and the city of Seattle in particular, there is now, and was at all the times herein mentioned, a general customary standard of measurement in general use for all legal and official advertisements in daily newspapers throughout the United States, the state of Washington, and particularly the said city of Seattle. That said general, customary standard of measurement is in nonpareil type, in matter set solid in columns two and one-sixth inches wide in length of line of matter and two and one-quarter inches between column rules, there being in each inch of said legal and official advertisements twelve lines. That at all the times herein mentioned, and at the time of the submission of said bids to the said city council, said general custom and usage was well known to all the defendants herein. That the plaintiff herein, in filing with the said city clerk aforesaid its said proposals, had in mind said general custom and usage, and that said proposal was made with the understanding on the part of plaintiff that said general customary standard of measurement, to wit, nonpareil type, in matter set solid, should be considered as a part of its bid. That when said bids were opened by said city council they were held under consideration one week without further acting thereon, and while said bids were so held under consideration said plaintiff made known to said city of Seattle, and to said city council, and to each and all the members thereof, that said general customary standard of measurement existed, and that plaintiff desired that its said proposal should be considered in the light of said general customary standard of measurement; and made known to said city council, and to each and all the members thereof, that it desired to be understood by its said proposal that it intended to use said general customary standard of measurement, to wit, nonpareil type, and matter set solid; and made known to said city council then and there that it desired a resolution to be adopted by the said city council designating the newspaper of plaintiff as the city official newspaper for the fiscal year 1899, and to have incorporated in the said resolution the said general customary standard of measurement, to wit, nonpareil type, in matter set solid." It is further averred that the respondent is a taxpayer of the city of Seattle, and pays each year several hundred dollars in general taxes for municipal purposes in the city of Seattle and county of King; that, if its bid should be accepted, the cost to the city for its official printing would be about $5,000, whereas if the bid of the Post-Intelligencer Publishing Company should be accepted it would cost the city at least $7,800; that these facts were well known to each member of the city council, but, notwithstanding the same, the coun-

cil wantonly, maliciously, fraudulently, and with the intent to defraud the plaintiff and all other taxpayers of said city out of at least the sum of $2,800, attempted to award said printing to the Post-Intelligencer Publishing Company by adopting a resolution of the purport above mentioned. A trial was had, which resulted in a decree granting to plaintiff below a permanent injunction as prayed in the complaint, the purport of which was first hereinbefore mentioned. The defendants below have appealed from said judgment. Respondent moves to strike the statement of facts upon the following grounds: "(a) No copy of the statement of facts appears to have been served upon this respondent after the original was filed in the cause. (b) There does not appear to have been any service at all of any copy of the statement of facts upon this respondent. (c) That there has been no written notice, nor any notice at all, served upon this respondent of the filing of the statement of facts in the lower court. (d) Because the statement of facts was certified by the judge without notice to this respondent, and without any proof being filed of the service of the statement of facts upon this respondent. (e) That said statement was signed by the judge without any proof being filed that no amendments had been proposed by this respondent."

Some of the grounds urged upon the motion would be applicable under a former statute, as would also the decisions of this court cited in support thereof; but since the passage of the statute of 1893, as found embodied in 2 Ballinger's Ann. Codes & St. § 5058, they do not apply. However, the ground noted under "a" and "b," as above set forth, present a question that must be passed upon. The original record, as brought to this court, contained no proof whatever that the statement of facts had ever been served upon respondent. The affidavit of one Ralph D. Nichols is, however, brought here in a supplemental record, and states the following facts: "That affiant is an assistant in the law office of Stratton & Powell, attorneys for the defendant Post-Intelligencer Publishing Company, above named; that on the 5th day of May, 1899, affiant, for Stratton & Powell, as attorneys for the said defendant Post-Intelligencer Publishing Company, filed with the clerk of the above-entitled court the proposed statement of facts in the above-entitled cause, and that subsequent to the filing of the same, and upon the same day, affiant served the same upon Bausman, Kelleher & Emory, attorneys for the above-named plaintiff, by leaving a true copy at their office on the sixth floor of the Bailey Building in the city of Seattle, with A. F. Bunch, a clerk of said firm, then employed in said office, and in the presence of Frederick Bausman, a member of said firm." This proof, which is now submitted by supplemental record, shows that any service which may have been made was made by leaving a copy of the proposed statement with a clerk of the firm of attorneys who represented

respondent, but in the presence of a member of the firm. Section 4889, 2 Ballinger's Ann. Codes & St., provides the following method for such service: "The services may be personal or by delivery to the party or attorney on whom service is required to be made, or it may be as follows: If upon an attorney, it may be made during his absence from his office by leaving the papers with his clerk therein, or with a person having charge thereof." It will thus be seen that when an attorney is in his office the notice or paper must be left with him, and it is only in the event of his absence from his office that it may be left with a clerk. The affidavit states that a member of the firm of attorneys was present, which being true, the only effective service that could be made under the statute above quoted was by leaving the copy with him. It is not stated in the affidavit that the member of the firm who was present even had knowledge that the copy was left with the clerk. But, in any event, the attorney is entitled to have it served upon himself when he is present in his office. We must apply the statute as we find it. It is plain and unambiguous, and we do not feel authorized to give it any other interpretation than that which must be gathered from a strict reading thereof. The motion to strike the statement of facts must, therefore, be granted.

The remaining question is, does the complaint state a cause of action? A demurrer was interposed to the original complaint, which was, by the court, overruled. A supplemental complaint was also filed, which contains the substance of the recitals set forth in the original complaint, together with others. No demurrer appears to have been filed as against the supplemental complaint under which the cause appears to have been tried. There is, therefore, no assignment of error upon demurrer as to the supplemental complaint. The second assignment of error, however, is that the court erred in admitting any evidence at the trial. This challenges the sufficiency of the supplemental complaint in this court. The more material averments of the supplemental complaint have been hereinbefore mentioned, and an examination of the whole complaint satisfies us that it states a cause of action. The findings of the court fully sustain the averments of the complaint. The judgment must therefore be affirmed.

PEASE

v.

COMMON COUNCIL OF CITY OF SAGINAW.

(*Supreme Court of Michigan, May 7, 1901.*)

[85 N. W. Rep. 1082.]

Boards of Health—Employees—Physicians—Compensation—Reduction of Claim—Common Council.—Where a board of health was established by a city ordinance, giving it all the powers conferred on boards of health of townships and cities under How. Ann. St. c. 39, which gives such boards power to fix the compensation of health officers, and audit the fees of persons employed by them, such board is authorized to fix the compensation of a physician employed by them, and the common council has no power to reduce the amount so fixed.

Same—Same—Same—Effect of Accepted Order for Reduced Amount.—Where a board of health allowed the bill of a physician employed by them, and certified such bill to the common council, which reduced it, and allowed it as reduced, the physician's action in accepting and cashing an order for the reduced amount did not bar him from maintaining an action for the balance of his bill.

Certiorari to circuit court, Saginaw county; Byron A. Snow, Judge.

Mandamus, on the relation of L. Willard Pease, against the common council of the city of Saginaw to compel respondent to allow his claim for professional services. From an order denying the writ, relator brings certiorari. Reversed.

William G. Gage, for relator.
Henry E. Naegely, for respondent.

Long, J. Relator is a physician, and under the direction of the board of health of the city of Saginaw performed professional services for the city in certain contagious diseases. He presented his bill for $480 to the board of health, and that body allowed it at that sum. The bill was then certified to the controller and the committee of the council on finance and auditing, who, after taking testimony as to the value of the services, reached the conclusion that the usual charge was $3 per visit, instead of $5, as charged by the relator, and thereupon reported to the common council recommending that the claim be allowed at $292, and that relator be tendered that amount in full settlement of his claim. This recommendation being adopted by the common council, the bill was allowed at that sum. An order was drawn upon the city treasurer for that amount in favor of the

relator, which order he at first refused to take. It is the claim of relator that he called upon the city clerk, who informed him he could take the order, and that it would not be a receipt in full for his services, and that thereupon he took the order. The city refusing to pay anything more upon the claim, relator presented his petition for mandamus to the circuit court of Saginaw county to compel respondent to pay the balance of his claim. The respondent filed an answer to this petition, setting up the facts, and claiming that the relator had accepted the order in full payment of his claim. A replication was filed to this answer, and an issue framed upon the question whether the relator did accept the order in full payment of his claim. The court found upon that question in favor of respondent. The city, in making return to the order to show cause before the circuit court, returns that the value of relator's services did not exceed $292, and that this amount was tendered him, and by him accepted, in full payment of his claim. The court below having denied the writ of mandamus, the case is brought into this court by writ of certiorari. It is claimed by counsel for relator: (1) That it was the duty of the board of health to pass upon the amount of compensation; that that board only could fix the amount owing him; and that the amount so fixed could not be reduced by action of the common council, but that it was bound to issue the order to him for the amount claimed. (2) That, although the court below found that the relator accepted the $292 in full payment of his claim, yet, having the legal right to the full amount allowed by the board of health, he is not estopped from claiming the balance due him.

Act No. 455, Local Acts 1889, provides that: "The common council shall have power by ordinance to establish a board of health and to invest it with all such power and to impose upon it such duties as shall be necessary to secure the inhabitants of the city from contagious, malignant and infectious diseases, and to provide for its proper organization and for the appointment of proper officers; to make all such by-laws, ordinances and regulations for the government of such board of health and for the preservation of the health of the inhabitants of the city as shall secure the prompt and efficient discharge of the duties imposed upon the common council by such act." Title 9, § 1. Under this act the common council, April 21, 1893, passed the ordinance to establish a board of health, prescribing its powers and duties. The ordinance provides that the board of health shall consist of five members, to be appointed by the mayor and approved by the council; that the board shall select its own president, and possess all the powers and perform all the duties imposed upon boards of health of townships and cities under the provisions of chapter 39, How. Ann. St., and all acts amendatory thereof. The ordinance also provides that there shall be a health officer annually appointed by the common council from each of the

taxing districts of the city, and that the chief of police of said city shall be assistant health officer, and shall have the power to detail so many of the police force of said city to assist him in the discharge of his duties as he may deem necessary. It is also provided by section 14 of the ordinance that: "Any and all expenses incurred by the health officer or assistant health officers in the removal or abatement of any nuisance or in the putting of any premises in a sanitary condition shall be certified by said officer under whose direction the same shall be expended to the controller of said city, and shall be audited and paid in like manner as other claims against the city," etc. It appears that under the charter of the city all boards have the power to certify to the common council for payment accounts of all indebtedness incurred by them. It is contended by counsel for respondent that it is obvious that the legislature intended, by enacting the foregoing section of the charter, to lodge the power in the common council to bind the city in regard to the amount of any claim against it; that it was not intended that the expense incurred by the board of health, or by the health officer or his assistants, should be fixed and determined by the board of health, but by the common council. We think this contention cannot be sustained, for the reasons: (1) That the ordinance does not apply to services rendered by the health officers; (2) that the value of the services of a health officer, under chapter 39, How. Ann. St., must be determined by the health board. The ordinance of the city creating a board of health provides that the board shall possess all the powers of boards of health in townships under the provisions of chapter 39, How. Ann. St., and all acts amendatory thereof. The board of health in townships under that chapter have the power, by section 2, to fix the compensation of health officers, and to audit all fees and charges of persons employed by them in the execution of the health laws and their own regulations. That the board of health can fix and determine such compensation has been many times held by this court. Wilkinson v. Long Rapids Tp., 74 Mich. 67, 41 N. W. 861; Elliott v. Supervisors, 58 Mich. 452, 25 N. W. 461, 55 Am. Rep. 706; McKillop v. Board, 116 Mich. 617, 74 N. W. 1050. The acceptance of a part of the amount fixed by the health board will not preclude the health officer from receiving the whole. Wilkinson v. Long Rapids Tp., 74 Mich. 68, 41 N. W. 861. The order of the court below must be reversed, with costs, and an order entered here directing the council to pay the amount found due by the health board. The other justices concurred.

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